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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

No. 117

DANIEL V. HARKIN AND UNION BANK OF CHICAGO,
RECEIVERS, ETC.,
Petitioners,

vs.

EDWARD J. BRUNDAGE, RECEIVER, ETC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

LLOYD C. WHITMAN,
BERNHARDT FRANK,
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HARRISON & LEDDEN CO., LAW PRINTERS, CHICAGO

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners herewith supplement their original supporting brief, heretofore filed under the same cover with their petition for certiorari (writ allowed November 23, 1926), in order to clarify and answer positions taken by respondents in their extended answer to the petition.

Respondents' major premise of law is counsel's bland assertion (Answer, page 6) that the opinion of this Honorable Court in *Palmer* v. *State of Texas*, 218 U. S. 118, "is of no value" because this Court there so misapprehended the questions before it that "the substance" of that case was not "touched upon" in the opinion therein,—that this Court's

opinion in that case was "talk of impossible and irrelevant things" (Answer, page 8). Counsel's rhapsodic contemplation (Answer, page 7) of Hobhouse's "Morals in Evolution" and "Social Development, Its Nature," etc., perhaps explains their overlooking the significant fact that the several Circuit Courts of Appeal are unable to adopt counsel's cavalier dismissal of the deliberate pronouncements of this Court in *Palmer* v. *Texas*, and this Court's uncritical citation of *Palmer* v. *Texas*, in *Lion Bonding Insurance Co.* v. *Karatz*, 262 U. S. 71, 89.

Respondents' major premise of fact is a misstatement of the record. Counsel say (Answer, page 35, italics respondents'), "The bill filed in the District Court prayed that *all* the assets of the corporation * * * be distributed among the creditors." The very bill of complaint in the federal court alleges (R. 4) that the defendants' assets "exceed its liabilities by more than $1,500,000." In fact, as the record shows (Bill, par. fifth, R. 8), what the bill prays is that *all* of the assets be "administered for the benefit of the plaintiff and the other creditors *and stockholders* of said defendant, and "that the assets of said defendant may be ascertained, marshalled and administered and the rights, interests and equities of all creditors, shareholders and others in respect therein be ascertained and adjudged;" that (Bill, par. 6, R. 8) "the property and assets of the defendant may be ordered sold, * * *, and that the proceeds of any such sale be distributed among those entitled thereto as this court shall determine."

Mixture of law and fact, entering, in one way and another, into the whole argument of the first 63 pages of respondents' answer, is the further premise (Answer, page 36, italics respondents') that "*not an issue that could possibly be determined in the Superior Court was involved in the proceeding in the District Court.*" This assertion is not borne out by the record. The federal court bill prays (Bill, par. 6, R. 8)

that "all of the property and assets of every name and nature, both legal and equitable, belonging to said defendant, be * * * administered for the benefit of the plaintiff and the other creditors and stockholders." Such an administration would of necessity include determination and disposition by the federal court of every issue, subject matter, and relief sought or possible in the state court proceedings, with the sole exception (peculiar to the state court just as the question of the plaintiff's citizenship was peculiar to the federal court) of the complainant stockholders' right to institute the derivative proceedings. Whether involved courts are courts of concurrent jurisdiction—whether each court has "the power to deal with the general subject involved in the action" in the other court (see Answer, Page 85), is a question of its potential jurisdiction, not of its power so to do in the particular case then pending, and is not determined or controlled by distinctions turning on qualifications of particular parties plaintiff. Such distinctions "fail to reach or destroy the underlying * * * general equitable jurisdiction" but are all mere "impediments or obstacles to the exercise of that jurisdiction."

Broadly speaking, possession of the property and operation of the business of the defendant corporation by either court would necessarily draw to that court all questions incidental to such possession and operation (*Farmers Loan & Trust Co.* v. *Lake St. El. Ry. Co.*, 177 U. S. 51, 61.)

Inferentially, the premise of counsel's attempted differentiation of the two proceedings (Answer, pp. 14-16, 35) on the ground that the state court could not dissolve the defendant corporation, is the erroneous assumption that the federal court, in the proceedings therein pending, could dissolve the corporation. But counsel themselves admit (Answer, page 14) that the federal court bill "states no cause of action under Sections 51 and 53 of the Corporation Act" of Illinois.

Points I, II and III, pages 1-63 of respondents' answer, hopelessly confuse "infringement of jurisdiction" of *causes*

and "interference with possession" of *property*, and thus deduce that there can be no litigable conflicting claims of right to possession of property—no constructive possession of property—unless there is an "infringement of jurisdiction" of identical causes of action,—unless "*the issues involved, relief prayed for, and parties to the two suits are so substantially alike that the lis pendens of the last brought is included in the first*" (Answer, pages 48-49, quoting *Empire Trust Co.* v. *Brooks*, 232 Fed. 641). Counsel ignore the nature of so-called conservation proceedings as elucidated by this Court in *In Re* Metropolitan Railway Receivership, 208 U. S. 90, and overlook (Answer, p. 62), the application to the instant case of the holding in *Ward* v. *Foulkrod* (C. C. A. 3rd Cir.), 264 Fed. 627, 633 (See, Our Original Brief, pages 19 & 21), that the real controversy was the same in both federal and state court.

And counsel assert (Answer, page 65) that your petitioners' challenge the jurisdiction of the federal court upon the sole ground that the property in dispute was in the constructive possession of the state court, resting this assertion (Answer, page 65-66) on the two closing paragraphs of the petition of March 13, 1925 (R. 21). The latter of these two paragraphs charges that "by reason of the premises" the federal court was without jurisdiction to appoint a receiver. Among the "premises" thus referred to are the allegations of the petition of the circumstances, *so far as then known to your petitioners*, of the filing of the federal court bill, including the charge (R. 19-20) that the defendant corporation brought about the filing of the federal court bill to evade the jurisdiction of the state court and deprive the complainant in the latter case of all remedy in the premises,—as it were (*Ward* v. *Foulkrod*, 264 Fed. 627, 635), "to play one court against another * * * to defeat rather than to aid the administration of justice."

The motion and petition of March 13, 1925 (R. 21), presented all the facts then known to your petitioners. When

the matter came on for hearing, your petitioners, *per force*, called as witnesses the very conspirators, Messrs. Cowan, Byfield, Phillipson and Solomon. The truth would never have been uncovered but for the happy circumstance that Mr. Solomon was placed on the stand and compelled to testify knowing that Cowan, Byfield and Phillipson had already committed themselves (R. 107), but in ignorance of what their testimony had been (R. 102). The applicability of Section 37 of the Code turns not on what little your petitioners knew or could guess on March 13, 1925, but upon the full facts as disclosed by Solomon's enforced frankness.

And the basis of this whole branch of counsel's argument is the false premise that the jurisdiction of the District Court as a federal court not only cannot be attacked for the first time upon appeal (See *C. B. & Q. R. R. Co.* v. *Willard*, 220 U. S. 413, 419, and cases cited), but, furthermore, that the question must be raised at the earliest possible moment and when raised must include a definite and specific application by the party litigant for all relief possibly available under Section 37 of the Code. This is a misapprehension of Section 37 which contemplates that whenever the lack of jurisdiction comes to the attention of the court it shall be the duty of the court, *sua sponte*, to "proceed no further therein, but dismiss the suit." Your petitioners' motion and prayer (R. 16) to the District Court for an order on the federal court receiver to surrender possession of the disputed property to your petitioners was, in effect, a motion and prayer that as to the property the District Court, in the language of Section 37 of the Code, "proceed no further." Any further motion by your petitioners (Compare Answer page 2, and Point IV, Answer pages 64-67) would properly come in when your petitioners, by substitution of attorneys, were in a position to move in the name of the defendant company.

The contention that in the federal court the immaturity of the defendant company's alleged obligation to the plaintiff

could be waived by the defendant company (Answer, page 82),—that the state court receivers had "no other or greater rights than said defendant" (Answer, page 86)—utterly ignores the status previously effected by the proceedings in the state court on Monday, February 16, 1925 (See Pet. for Cert. pages 2-3, 17-18), and your petitioners' succession (upon their subsequent appointment, on and pursuant to the motion of February 16, 1925, R. 69-70, and qualification accordingly, R. 70) to the rights incident to this status, as of Monday, February 16, 1925.

Counsel have not so far had the temerity to contend that either the federal court plaintiff or the federal court receiver was a purchaser (See Pet. for Cert. pages 18, 22), or that there is anyone in a position to claim an estoppel as against your peitioners or the state court complainant. To and including March 13, 1925, when your petitioners filed in the federal court their formal motion and petition of that date, no creditor, stockholder or other persons had intervened or become party to the federal court proceeding (R. 23). At most the situation is that in *Shields* v. *Coleman*, 157 U. S. 169, 182, where this Court said, "Whatever of hardship there may be, whatever expense may result, must fall upon the parties who have thus wrongfully secured the taking away of the possession of the property from the custodian rightfully appointed by the state court. The mere forcible continuance of possession by the federal court does not transform that which was in the first instance wrongful into a rightful possession."

As held by the Circuit Court of Appeals in the instant case (Opinion, R. 170-171), the state court had jurisdiction to appoint receivers. The Superior Court of Cook County, Illinois, sitting in chancery, is a court of general jurisdiction (*C. & N. W. Ry. Co.* v. *C. & E. I. R. Co.*, 112 Ill. 589, 597; *Kenney* v. *Greer*, 13 Ill. 432, 438). Its jurisdiction was not dependent upon the sufficiency of the bill, upon plaintiff's

right to the relief demanded, upon the regularity of the proceedings, or upon the correctness of the decision rendered (15 Corpus Juris, 735; *Lion Bonding Insurance Co.* v. *Karatz*, 262 U. S. 77, 90; *Griswold* v. *Hazard*, 141 U. S. 260, 290, 35 L. ed. 678; *Herron* v. *Dater*, 120 U. S. 464, 477, 30 L. ed. 748; *Windsor* v. *McVeigh*, 93 U. S. 274, 288, 23 L. ed. 914; *O'Brien* v. *People*, 216 Ill. 354, 363).

The state court bill no more than the federal court bill (Answer, page 14) proceeded under Sections 51 and 53 of the Illinois Corporation Act. But decisions or statements by the Illinois courts (See Answer, pages 15-21, 89) that Illinois courts of equity have no authority to appoint a receiver of a corporation *as an incident to dissolving the same* except in cases in which dissolution is authorized by the Illinois Corporation Act, are beside the mark. The Illinois court is without jurisdiction to dissolve a corporation except as authorized by the Illinois Corporation Act and otherwise has, therefore, no jurisdiction to appoint a receiver *for that purpose*, or to appoint a receiver (to quote from *People* v. *Weigley*, 155 Illinois 491, 502) as "a mere incident to that relief." The Illinois Supreme Court in indicating, *arguendo*, in *Blanchard Bro. & Lane* v. *The Gay Co.*, 289 Ill. 413, the necessary elements of a simple minority stockholder's bill, invoking exercise of the chancery court's common law as distinguished from statutory power to appoint a receiver, lays down no new rules, but merely classifies and brings together the rules on this subject which have long obtained in Illinois (*Merrifield* v. *Burrows*, 153 Ill. App. 523; *Schmidt* v. *Johnson*, 166 Ill. App. 623, and, generally, in the federal courts, *Burnrite Coal Briquette Co.* v. *Riggs*, 47 Sup. Ct. 578, 579; Adv. Op. 71 L. ed. 660, 661).

In the instant case (Op. R. 171) the Circuit Court of Appeals declares the applicable rule to be "that if the two suits were different, there was no conflict of jurisdiction [interference with possession], and the court which first acquired

jurisdiction over the *res* by actual seizure through its receiver should retain jurisdiction [possession]." For authority *of this Court* for that ruling counsel for respondents' place their reliance (Answer, page 62) upon *Moran* v. *Sturges*, 154 U. S. 256, which, as pointed out at page 14 of our original supporting brief [For "Exception (*b*)" read, "Exception (*a*)"], is merely an illustration of our "Exception (*a*)", namely, that when the court seizing the property is exercising an exclusive jurisdiction conferred upon it by the law of its origin or source of jurisdiction—as in admiralty—priority of actual seizure is controlling. In our original supporting brief (page 11) we present the correct rule as that constructive possession is controlling except under specified conditions going to whether the involved courts are courts of concurrent and co-ordinate jurisdiction. In the very case of *Moran* v. *Sturges*, 154 U. S. 256, 284, relied upon, as aforesaid, by respondents, the same rule is laid down though in different verbage (italics supplied):

> "As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, *and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute.*"

Respectfully submitted,

LLOYD C. WHITMAN,
BERNHARDT FRANK,
Counsel for Petitioners.

No. 117

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ANSWER OF RESPONDENTS.

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A conflict of jurisdiction arises only when the same controversy is presented to coordinate courts of concurrent jurisdiction for adjudication. In such cases the court that first acquires jurisdiction of such controversy has exclusive jurisdiction (of the controversy), which the other court is powerless to defeat by means of the mere prior seizure of the property incidentally involved.

But on the other hand, where the controversy is not the same there is no conflict of jurisdiction. And the court that in the exercise of its jurisdiction first seizes property of the defendant necessarily holds it against all the world until its jurisdiction of the controversy is exhausted. The mere fact that another court first acquired jurisdiction of another and different controversy against the same defendant is irrelevant 1

II.

The bill filed in the District Court by the United States Worsted Sales Co., a simple contract creditor, invoked the undoubted powers of said court to conserve and distribute the assets and property of the Daniel Boone Woolen Mills, Inc., among creditors.

(1) There was no conflict of jurisdiction between the District Court and the Superior Court, because

(a) Conservation proceedings as devised and developed by the Federal Courts are not only utterly unknown to the practice and procedure of Illinois courts, but contrary to the express decisions of the Supreme Court of Illinois. As a mere simple contract creditor the United States Worsted Sales Co. would have had no standing in the Superior Court, so far as the relief prayed for in the bill filed in the District Court was concerned. Neither could a simple contract creditor intervene or otherwise obtain any relief in the proceedings theretofore instituted in the Superior Court.

There was, therefore, no concurrent jurisdiction; and consequently no conflict of jurisdiction.

(b) The conservation proceedings instituted in the District Court were essentially different from the proceedings then pending in the Superior Court at the instance of a stockholder of the Daniel Boone Woolen Mills, Inc. The parties were different; the purpose of each proceeding was different; the subject-matter was different; the relief asked was different.

(2) It therefore follows that having first actually seized the property and assets of the Daniel Boone Woolen Mills, Inc., the District Court was entitled to hold them until its jurisdiction of the controversy pending in said court was exhausted 10

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I.

A conflict of jurisdiction arises only when the same controversy is presented to coordinate courts of concurrent jurisdiction for adjudication. In such cases the court that first acquires jurisdiction of such controversy has exclusive jurisdiction (of the controversy), which the other court is powerless to defeat by means of the mere prior seizure of the property incidentally involved.

But on the other hand, where the controversy is not the same there is no conflict of jurisdiction. And the court that in the exercise of its jurisdiction first seizes property of the defendant necessarily holds it against all the world until its jurisdiction of the controversy is exhausted. The mere fact that another court first acquired jurisdiction of another and different controversy against the same defendant is irrelevant.

It is undisputed that the District Court appointed a receiver for the Daniel Boone Woolen Mills, Inc., and

that such receiver took actual possession of all the property of said corporation *more than one week before* the Superior Court of Cook County undertook to appoint receivers for the same corporation and the same property (Tr. 12-15, 69).

Nearly one month after the appointment of the receiver by the District Court, the would-be, or supernumerary, receivers appointed by the Superior Court petitioned the District Court for—

> (a) An order directing the receiver appointed by said court to deliver to petitioners all the property of the Daniel Boone Woolen Mills, Inc., and
>
> (b) "leave to substitute said State Court Receivers' attorneys, Messrs. Blum, Blum & DeLaney, as solicitors in the above entitled cause for said Daniel Boone Woolen Mills, Inc., to the end that said State Court Receivers may and shall control and dictate the acts and doings of said Daniel Boone Woolen Mills, Inc., as defendant in the above entitled cause." (Tr. 16-17).

This anomalous petition—which recognized and invoked the jurisdiction of the District Court—was *not* in the alternative. *The District Court was not asked to dismiss the suit pursuant to Section 37 of the Judicial Code*; neither did the petitioners aver any facts which evidenced an intention to rely upon said section, or which made out a case thereunder.

It is a fact that the *filing* of the bill in the Superior Court antedated the *filing* of the bill in the District Court by five days—the former bill having been filed on February 14, 1925, (Tr. 17), the latter bill having been filed on February 19, 1925, (Tr. 2). But, whereas, the District Court appointed a receiver (who immediately took actual possession of all the defendant's property) on February

19, 1925, the Superior Court did not undertake to appoint receivers until February 28, 1925, (Tr. 69). And not until March 13, 1925, was the anomalous petition above mentioned filed in the District Court (Tr. 16).

This petition was based solely upon the preposterous ground that because on February 16, 1925, the plaintiff in the Superior Court had made a motion for the appointment of a receiver—

> "said Superior Court of Cook County acquired jurisdiction to determine the question of the propriety of the appointment of such receiver * * * * and by reason of the premises said Superior Court of Cook County acquired on February 16, 1925, *constructive possession* of all the assets, property and books of the said Daniel Boone Woolen Mills, Inc., *and the prior right and jurisdiction*, as against any court proceeding in *a cause thereafter instituted, to take actual possession* of the books, property and accounts of said Daniel Boone Woolen Mills, Inc., *by and through the appointment of a receiver* or receivers of and for said last mentioned company, its property, assets and books." (Tr. 21).

Of course the appointment of a receiver is a mere incident to the ultimate relief sought.

It is equally true that courts never deal with material things, but merely declare the legal relations that exist between juristic persons. But let us waive this last point.

Neither need we embark on any discussion of that most important and interesting subject of *possession*, which has engaged the attention of so many subtle and brilliant minds since the days of the jurisconsults.

It suffices to state that courts have jurisdiction of *causes, or controversies*, which may or may not involve

property. Where the same *controversy* is presented to two different courts for decision there arises *a conflict of jurisdiction*. In *such cases* the court which first obtains jurisdiction of *the controversy* is entitled to retain it without interference, and cannot be ousted because it may not have first seized the property involved. And what the other court surrenders is jurisdiction of *the controversy*. The suit pending in such court is dismissed,—the *property* involved necessarily following *jurisdiction* of the *controversy*.

But where different *controversies* are presented to different courts for adjudication, *then there is no conflict of jurisdiction*. Each court retains jurisdiction of the particular controversy before it. And *in such cases* the court which first seizes the property of the defendant will hold said property until its jurisdiction of the particular controversy before it is exhausted.

Why should one court which has jurisdiction of *one* controversy, and which in the exercise of such jurisdiction has first seized property of a defendant, turn it over to another court that has jurisdiction of another and different controversy? . . . . . Courts are numerous, controversies are as multitudinous as the stars and new ones arise endlessly. Conflicting interests and claims inevitably lead to a struggle for the possession of the property of debtors. *Disparate causes of action against one individual may be simultaneously held by divers persons who may properly apply to different courts for relief*. And in such cases the property of the defendant is virgin to the court that first actually seizes it. Of necessity such property is held against all the world until the termination of the controversy before

such court. The foregoing principles are elementary, and have been repeatedly announced by this Court.

Moran v. *Sturges*, 154 U. S. 256.

Pacific Live Stock Co. v. *Lewis*, 241 U. S. 440, 447.

Helm v. *Zarecar*, 222 U. S. 32, 35—decision with respect to 2nd plea, which is not incorporated in the syllabus.

Empire Trust Co. v. *Brooks* (C. C. A. 5th Cir.), 232 Fed. 641—the most exhaustive and illuminating discussion of the subject in the books, by a judge of unusual powers of analysis and generalization.

De La Vergne Refrigerating Mach. Co. v. *Palmetto Brewing Co.* 72 Fed. 579.

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15 Corpus Juris, pp. 1163-64-71.

The case of

Farmers' Loan Co. v. *Lake Street Railway Co.*, 177 U. S. 21, 44 L. ed. 667

is not contrary to the foregoing fundamental principles. As pointed out in

Empire Trust Co. v. *Brooks*, 232 Fed. 641,

"• • • • • in the case of *Farmers' Loan Co.* v. *Lake Street Ry. Co.*, *supra*, the suit in the

> federal court was an action to foreclose a mortgage, and that in the State Court sought to enjoin foreclose."

In other words, the CONTROVERSY IN EACH CASE WAS THE SAME. And inasmuch as the Federal Court in that case had first acquired jurisdiction of the *controversy*, it was held that its jurisdiction (of said controversy) was exclusive.

We admit that the case of

Palmer v. *State of Texas*, 212 U. S. 118.

may not so easily be brought within the foregoing principles if only the language of the opinion be regarded. However, it offers no comfort to petitioners, for in that case the state court *first appointed a receiver, who duly qualified* BEFORE *the filing of the bill in the federal court.* On page 129 the Court (speaking through Mr. Justice Day) say:

> "We think the law of this court is well established to be that jurisdiction over the *property* was acquired by the state courts *when the receiver was appointed, the judicial process served, and the receiver duly qualified*, although the state receiver had not taken actual possession of the property. This principle was recognized in *Farmers' Loan & Trust Co.* v. *Lake Street Electric Ry. Co.*, 177 U. S. 51, 61 xxx",

The opinion in that case (212 U. S. 118) is of no value as a precedent, for the reason that the point argued by counsel and determined by the Court was whether the federal or the state court had *jurisdiction* of the defendant's *property*. Of course, courts have jurisdiction only of *controversies;* and neither the argument nor the opinion touched upon the substance of the case.

What is the historical view of courts? How did they arise, what is their function, of what have they jurisdiction?

In the most primitive societies private wrongs were revenged by private individuals and such others as could be induced to assist. This method generally led to blood feuds which imperilled the entire community. In more advanced societies the avenger was either assisted or controlled by public force, or could get the judgment of a public court to sanction his act. In yet more advanced societies a regular system of justice deals normally with all serious disputes and grave offenses.[1]

> "The primary function of a primitive tribunal is not so much to discover the merits of the case and make an equitable award, as to keep the peace and prevent the extension of wild and irregular blood feuds."[2]

The primitive "court" is a peacemaker rather than a judge (Morals in Evolution).

Finally, came impartial tribunals, which heard evidence and endeavored to render to each man his due. But even today courts never act in the absence of a *breach of duty*. And they never act *sua sponte*. Some (juristic) person must invoke them. *The judicial function is the imposition of sanctions for breach of duty in concrete cases.*

It necessarily follows, therefore, that courts have jurisdiction only of *controversies*. The statutes (and

[1] Morals in Evolution, (4th ed.) by L. T. Hobhouse.
Social Development, Its Nature and Conditions (1924) pp. 246 *et seq.* by L. T. Hobhouse.

[2] Morals in Evolution, p. 114

constitutions) creating courts and defining their jurisdiction may be profitably consulted in this connection.

Jurisdiction is the power to hear and determine a *controversy*, which may or may not involve property. In any case the property is a mere incident. (Courts merely declare the legal relations that exist among juristic persons. They never seize property, neither have they jurisdiction over it. And property *in custodia legis* is a fiction as unnecessary as it is transparent.)

Conflicts of jurisdiction arise, therefore, only when the *same controversy* is presented to different courts for decision. Where *different* controversies are pending in two or more courts there can be no *conflict of jurisdiction*.

And where it is claimed that a conflict of jurisdiction exists, to inquire which court had jurisdiction over *property* is to talk of impossible and irrelevant things.

As a matter of fact, the case of

Palmer v. *Texas*, 212 U. S. 118,

involved a *conflict of jurisdiction*. In other words, the *same* controversy was presented to both the state court and the federal court for decision.

After a judgment imposing heavy penalties upon the Waters-Pierce Oil Co. and forfeiting its license to do business within the State of Texas, the State filed an application in the State Court for the appointment of a receiver. The previous judgment was recited; and it was averred that the property of the defendant within the State was inadequate to satisfy said judgment, that most of its assets consisted of personal property

which might easily be moved into other states; that the State of Texas had a lien on all such property (212 U. S. 113); "that the judgment of forfeiture prevented the Company from doing business in the state; and that it was necessary, to protect the rights of the state, that the business of the defendant should continue, at least temporarily" (158 Fed. 705, 706); a receiver was asked, as well as an injunction restraining the defendant from removing its property from the State.

The State Court granted the application for a receiver entered the injunction, and the receiver duly qualified.

Thereafter a stockholder filed his bill in the Federal Court. He recited the original proceedings in the State Court, the imposition of the heavy penalties, the forfeiture of the defendant's license to do business, and asked for a receiver in order that the business of the company might be temporarily managed, its property sold, and its business wound up (212 U. S. 118, 123).

In other words, both plaintiffs relied upon the same facts, viz., the prior judgment, forfeiture of license, inability of the defendant to carry on its business, necessity for conserving its property and winding up its business.

The controversies between the two plaintiffs and the defendant were identical. Their purpose was the same. Their subject-matter was the same.

And inasmuch as the State Court first obtained jurisdiction of the *controversy*, it could not thereafter be ousted.

Let us now determine whether the controversy presented to the District Court was the same as the controversy then pending in the Superior Court.

II.

The bill filed in the District Court by the United States Worsted Sales Co., a simple contract creditor, invoked the undoubted powers of said court to conserve and distribute the assets and property of the Daniel Boone Woolen Mills, Inc., among creditors.

(1) There was no conflict of jurisdiction between the District Court and the Superior Court, because

(a) Conservation proceedings as devised and developed by the Federal Courts are not only utterly unknown to the practice and procedure of Illinois courts, but contrary to the express decisions of the Supreme Court of Illinois. As a mere simple contract creditor the United States Worsted Sales Co. would have had no standing in the Superior Court, so far as the relief prayed for in the bill filed in the District Court was concerned. Neither could a simple contract creditor intervene or otherwise obtain any relief in the proceedings theretofore instituted in the Superior Court. There was, therefore, no concurrent jurisdiction; and consequently no conflict of jurisdiction.

(b) The conservation proceedings instituted in the District Court were essentially different from the proceedings then pending in the Superior Court at the instance of a stockholder of the Daniel Boone Woolen Mills, Inc. The parties were different; the purpose of each proceeding was different; the subject-matter was different; the relief asked was different.

(2) It therefore follows that having first actually seized the property and assets of the Daniel Boone Woolen Mills, Inc., the District Court was entitled to hold them until its jurisdiction of the controversy pending in said court was exhausted.

On February 19, 1925, the United States Worsted Sales Company, a citizen of the State of New York, filed its bill in the District Court against the Daniel Boone Woolen Mills, Inc. The bill showed that the defendant owed the plaintiff $6176.43 for goods, wares and mer-

chandise sold and delivered, and that there were no offsets or counterclaims in favor of the defendant. It also showed:

That as of December 31, 1924, the balance sheet of the defendant showed that said defendant had current assets consisting of cash, notes and accounts receivable, raw materials, goods in process and finished merchandise of the value of $1,036,076.39; current liabilities of $222,446.19; fixed assets, such as factory sites, buildings, machinery, etc., which were carried on the defendant's books at the value of $1,664,063.41; mortgage indebtedness of $412,500.00, and a deficit of $2,678,496.50 (Rec. 3-4).

That "*the defendant * * * is now unable to meet its maturing obligations.*" That interest payments on mortgages were past due and unpaid; that the defendant was unable to pay bank loans amounting to $30,000, which were then past due, and payment of which had been demanded; that defendant's outstanding notes aggregating $75,000, had been protested; that the defendant's Federal Capital Stock tax was unpaid; that there were other large claims against the said defendant, and that the defendant had only $6000, in cash on hand, which was insufficient to meet its current weekly payroll (Rec. 406).

That "*the defendant is wholly without funds with which to pay any of the foregoing obligations, and has no means of obtaining funds with which to meet said obligations, except by the completion of its products now in course of manufacture and shipment of the same.*"

That the defendant then had orders of the value of more than $400,000, on hand, many of which were in process; that the assets and property of the defendant would be dissipated and lost, *if subjected to numerous claims of creditors in actions at law* (Rec. 6-7). That "this suit is brought for the *purpose of enforcing the claim of the complainant against the defendant, the determination of the claims of the creditors of the defendant, marshalling of the assets of said company, the sale and distribu-*

tion of said assets among its creditors, the appoin ment of a receiver for the conservation and prote tion of said assets and for the other relief herei after set forth." (Rec. 3).

The plaintiff prayed:

1. That it be permitted to file its bill of complai "for the benefit of itself and of all other creditors the defendant * * * who may choose, either by a quiescence or by intervention, to become parties here and to take the benefit thereof."

2. That a receiver be appointed forthwith "to ta charge of and manage the assets, property and busine of the defendant until the further order of this court. That the receivers be given the most ample powers specifying them. (Rec. 8-9).

3. That—

"* * * * the said receiver or receivers so a pointed be authorized to demand, sue for, collect, r ceive and take into possession all the goods, cha tels, rights, credits, moneys, effects, lands, tenement books, papers, choses in action, and all other pro erty and assets of said defendant corporation with the jurisdiction of this court, and to institute a prosecute suits at law or in equity for the recove of any assets, property or demands belonging to existing in favor of the said defendant.

That this court may order, direct and decree th all of the property and assets of every name a nature, both legal and equitable, belonging to sa defendant and within the jurisdiction of this cou be held and declared to be a trust fund to be he and administered for the benefit of the plaintiff a the other creditors and stockholders of said defen ant, and that the assets of said defendant may ascertained, marshalled and administered and t rights, interests and equities of all creditors, sha

holders and others in respect therein be ascertained and adjudged.

That at such time as may be found just and proper, the property and assets of the defendant may be ordered sold, as an entirety or otherwise, in such manner and on such terms and conditions as this court shall deem just and equitable, and that any such order or sale shall make proper and suitable provision for the preservation of all equities, rights, priorities, claims and liens of the creditors of the defendant, and shall provide for the sale of the property and assets of the defendant, subject to or free and clear from any and all liens and incumbrances, in total or in part, in such manner and upon such terms as this court may direct, and that the proceeds of any such sale be distributed among those entitled thereto as this court shall determine, and that the complainant may have such other and further relief in the premises as this court may deem just and proper, and as may be necessary fully to protect and enforce the rights and equities of the complainant and of all other creditors of the defendant." (Tr. 8-9).

4. For general relief.

Such bills originally caused immense controversy, but they are now too familiar to require even an explanation, much less a defense, of them.[3] They are, neverthe-

[3] In re Metropolitan Railway Receivership, 208 U. S. 90.

Hollins v. *Brierfield Coal & Iron Co.*, 150 U. S. 371.

Horn v. *Pere Marquette R. R. Co.*, 151 Fed. 626.

Burton v. *Peters Salt & Lumber Co.*, 190 Fed. 262.

Lukrig Collieries Co. v. *Interstate Coal & Dock Co.*, 281 Fed. 265.

Alcalay v. *Community Fuel Corporation*, 291 Fed. 686.

In re Connecticut Brass & Mfg. Co., 257 Fed. 445.

Walker v. *U. S. Light & Heating Co.*, 220 Fed. 393.

Cincinnati Equipment Co. v. *Degnan*, 184 Fed. 834.

Kessler v. *William Necker, Inc.*, 258 Fed. 654.

less, wholly unknown to the practice and procedure that obtain in the local courts of Illinois, and in most other States.

It is clear that the bill filed in the District Court states no cause of action under Sections 51 and 53 of the Corporation Act of 1919 (pp. 91-93, *infra*), for the reasons:

1. That it is not alleged that any stockholders of the Daniel Boone Woolen Mills, Inc., were responsible to said corporation "because of any unpaid stock liability."

2. That it is not alleged that the said corporation had been adjudged bankrupt, or that "an execution upon a judgment or decree of a court of record for the payment of money, after demand made by the officer" had been returned "no property found," or that it had remained unsatisfied for ten days after such demand, or that the corporation had dissolved, or that it had ceased doing business leaving debts unpaid.

The plaintiff did not seek to enforce stockholders' liability, if any. *Such was not the purpose of its suit.* It therefore follows that the plaintiff was remediless in the Superior Court, so far as sections 51 and 53 of the Corporation Act are concerned.

And of course the plaintiff could not have filed a creditor's bill, for the reason that a simple contract creditor must first reduce his claim to judgment, and have an execution issued and returned unsatisfied in whole or in part.

Sections 53 and 54 of the Corporation Act of 1919 are largely identical with section 25 of Chapter 32 of the

Illinois Statutes, which sections 53 and 54 superceded. Section 25 is set forth in the margin.[4] In

The People v. *Weigley*, 155 Ill. 491, 504,

the Supreme Court said:

> "We held in *Wheeler* v. *Pullman Iron and Steel Co.*, 143 Ill. 197, that the two clauses of the above section must be construed together, *and that the 'good cause' which must be shown by the second clause to authorize courts of equity 'to dissolve or close up the business of any corporation, to appoint a receiver therefor, with authority to wind up its affairs,' means some one or more of the causes mentioned in the first clause,—that is to say, courts of equity only have jurisdiction to so decree when certain causes exist, which are the doing or refraining from doing some act which shall subject the corporation to a forfeiture of its charter or corporate power, or allowing an execution or decree of any court of record for the payment of money, after demand made by the officers, to remain unpaid, or that the corporation has dissolved or ceased doing business, leaving debts unpaid.* It cannot be seriously contended that this bill shows the existence of any of these causes for dissolving the Northwestern Shoe Company at the time it was filed."

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[4] "If any corporation or its authorized agents shall do, or refrain from doing, any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record for a payment of money, after demand made by the officer, to be returned 'no property found', or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business leaving debts unpaid, suits in equity may be brought against all persons who are stockholders at the time, or liable in any way for the debts of the corporation, by joining the corporation in such suits, and each stockholder may be required to pay his pro rata share of such debts or liabilities to the extent of the unpaid portion of his stock, after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy his portion of such debts or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders. And courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor, who shall have authority, by the name of the receiver of such corporation (giving the name), to sue in all courts and do all things necessary to closing up its affairs, as commanded by the decree of such court." (Quoted in *People* v. *Weigley*, 155 Ill. 491, 503.)

It is, therefore, clear that the bill filed by plaintiff in the Federal Court would not entitle it to any relief whatsoever in the Superior Court, so far as sections 51-54 of the Corporation Act of 1919 are concerned.

It is also certain that neither the Superior Court nor any other local (Illinois) court has jurisdiction of purely conservation proceedings such as were originally evolved by, and are now matters of course in, Federal courts. In

Weigley, Bulkley & Gray v. *The People*, 51 Ill. App. 51,

Mr. Justice Gary stated the facts as follows:

> "*September 9, 1892, Jacob Graff filed a bill in the Superior Court, stating that he was a stockholder in the Northwestern Shoe Company, a corporation at Belvidere, in Boone County, Illinois, and in substance that the corporation was in pecuniary difficulties, its property being attached, its business stopped, and that unless a receiver was appointed to conduct its business, its asserts would be sacrificed, title to property which it held upon condition of continuing business forfeited, and the plant go 'to wreck and ruin', so that the complainant would get nothing for his stock; all of which evil consequences might be avoided by conducting the business through a receiver until the stock of goods, raw material, and credits of the corporation could be converted into cash, and applied to the payment of its debits.*
>
> *On the same day the bill was filed, the corporation appeared and consented to the appointment of Robert W. Wright, of Belvidere, as receiver, and the court appointed him.*
>
> September 20, 1892, Chick Brothers, for whom Weigley *et al.*, were attorneys, recovered in the Circuit Court of Cook County, a judgment against the corporation, and September 27, 1892, an execution upon the judgment was, by direction of Weigley *et al.*, as such attorneys, levied by Ames, who was

sheriff of Boone county, upon some boots and shoes of the corporation, which were in the freight house of the North Western Railway at Belvidere. * * *

Weigley *et al.*, and Ames, knew before the levy, that Wright had been appointed receiver.

It is not necessary to state at length the proceedings which ended in orders for attachments of Weigley et al., and Ames, for contempt of the court in refusing to obey the order of the court to surrender to the receiver the boots and shoes levied upon, to reverse which orders this appeal and writ of error are prosecuted.

There are many cases which hold that where the property rights of a private corporation are involved or threatened, and the governing power of the corporation, upon the application of a stockholder to that power to seek a remedy in equity, refuses so to do, he may go into equity, stating such refusal and the grievance, and obtain relief. Morawetz on Corp., Sec. 241. But such application and refusal are conditions precedent (Ibid.) and it needs no authority that even in such case the relief must be such as the corporation is itself entitled to.

A corporation is entitled to no greater protection of its property than an individual, and was it ever held that either a corporation or an individual was entitled to the protection of a court of equity against the process of the law to collect debts, because of the effect upon the prosperity of the debtor? Under an assignment for the benefit of creditors under the statute, or upon a bill filed for a dissolution of a copartnership, or upon a bill by a creditor of a corporation, under section 25 of the statute concerning corporations, where assets are under judicial control for ratable distribution among creditors, stringent measures to prevent interference have been sanctioned.

Sercomb v. *Catlin*, 128 Ill. 556, 30 Ill. App. 258, is an extreme instance, and however arrogant and despotic in its tone, the quotation from the Rhode

Island court, made by us in 30 Ill. App. 261, is doubtless good law.

The question then is, had the Superior Court jurisdiction to make the orders to surrender possession of the goods levied upon, and the answer to this question depends upon the jurisdiction of the court over the subject-matter of the suit.

We lay out of view the allegation of the bill that the corporation had title to lands and buildings in Boone county, and that one object, not clearly stated, may be the ultimate disposition of that property, and also that the home of the corporation was there.

These objections, if valid, could perhaps be waived by the corporation as being in the nature of personal privileges. But this bill is a bold undisguised attempt to do what in Robinson v. Raulston, 35 Ill. App. 166, was attempted, under disguise, and condemned.

If the final dissolution of the corporation be considered as the object of the bill, the court had no jurisdiction. *Wheeler v. Pullman Iron & Steel Co.*, 32 N. E. Rep. 420, 43 Ill. App. 626, 143 Ill. 197, where the case was decided the same way upon other grounds.

And if the staving off of creditors be the subject of the bill, it is hardly possible that anybody would claim that a court of equity should do that. In any aspect of the case, the court had no jurisdiction of the subject-matter; no right, power or authority to grant the relief."

With respect to these same conservation proceedings, the Supreme Court (155 Ill. 491, 502) said:

"*The vital question in the case then is, as stated in our former opinion, 'whether the Superior Court in which the receiver was appointed, and in which the order was entered to turn over the goods, had jurisdiction of the subject-matter of the bill.*' The relief sought by the bill in this case was the dissolution of the corporation and settlement of its business. The appointment of the receiver was a

mere incident to that relief, to enable the court to take possession of the property and business of the company and finally wind up its affairs. *It is clear, if the court was without jurisdiction to grant the ultimate relief prayed by the bill, it had no power to appoint the receiver and authorize him to assume possession and control of the corporation assets. It is well settled by the decisions of this court as well as the authorities generally, that courts of chancery are without jurisdiction to decree the dissolution of corporations, except in so far as that jurisdiction is conferred by statute; and we deem it too clear for argument, that if the Superior Court had jurisdiction to adjudicate upon the subject matter of the bill of Jacob Graff and grant the relief therein prayed, that jurisdiction must be attributed to Section 25, chapter 32, of our statute*, and not to its general equity powers, sitting as a court of chancery.

* * *

To hold that, under this statute, whenever creditors of a corporation attempt to collect their just claims against it by action of law, stockholders may invoke the jurisdiction of a court of equity to take charge of all the company assets, and thus defeat the creditors, because the enforcement of their rights by authorized processes of law would result in embarrassment or loss to the company, would be to not only violate its plain provisions, but to allow it to be used to defeat the very purpose for which it was enacted. Here is a bill by a single stockholder, other stockholders not being made parties. Only a part of the creditors are made parties, others being given no opportunity to question the jurisdiction of the court or the sufficiency of the bill. *None of the causes for which, by the statute, courts of equity are authorized to take charge of corporations and close them up, are alleged.* That the ultimate relief prayed for cannot be lawfully granted by the court upon this bill, it seems to us, must be conceded. Can it be said, nevertheless, the court, in making the interlocutory order appointing the receiver, only proceeded irregularly, and therefore the validity of that order cannot be questioned in this proceedings? We think not. *Having no general equity powers in the*

case, and the bill wholly failing to bring it within the provisions of section 25, the Superior Court exceeded its jurisdiction in making the order which appellees are charged with violating, and that order must therefore be held void."

If a stockholder of the corporation could not maintain such a bill in the Superior Court it is clear that a mere *creditor* could not do so.

And again in

Gilbert v. *Block, Receiver*, 51 Ill. App. 516,

the Court held:

"*It is not one of the functions of a court of equity to supervise or carry on the business of parties between whom or about whose affairs there exists no controversy. If parties are in accord as to their respective rights, they have, as a rule, no occasion to apply to a court of equity to act as their agent in caring for their property.*"

It was there said:

"*Numerous cases can also be found, where the United States Circuit Courts, especially in operating insolvent railways, have exercised a paternal authority at the instance of receivers, but not calmly considered case, where the point has been made, justifies a receiver appointed only to take possession of and sell property—unless acting under some statute—in originating proceedings to make more effectual the remedy of one of the parties.*"

In

Gillespie, Receiver, v. *Illinois Steel Co.*, 62 Ill. App. 594,

the Court stated the facts as follows:

"The question in these cases concerns the title to three rolls such as are used in rolling steel rails.

Earl in May, 1893, the appellee ordered these

rolls from the Chicago Foundry Company. Two of them were completed on the 22d day of the same month, and the third was completed early in the morning of the 23d of that month. In the meanwhile the Chicago & Kenosha Railway Company had been requested by the foundry company to send a car to the foundry, which it did, and the two rolls were placed upon the car. The third roll was brought alongside the car ready for loading. Shipping instructions were given by the foundry company to the railway company, directing the transportation of the rolls to the Illinois Steel Company, and the receipt of the railway company was given to the foundry company for all three rolls.

Matters being in this situation, on the morning of the 23d of May, the Chicago Foundry Company and three of its stockholders filed a bill in chancery in the Circuit Court of Cook County against Henry A. Keith, the only remaining stockholder in the corporation. The bill alleged that the assets and liabilities of the plaintiff company were about equal, each amounting to about $60,000; that the company was indebted for labor and other claims in an amount exceeding $5,000; that its operation had been stopped by strikes; that it was unable to meet its debts as they matured; that it had large and profitable contracts which it was unable, under the circumstances to carry out; and that the board of directors had resolved that the corporation should be wound up.

The court below, as soon as the bill was filed, appointed a receiver, who took possession of all the property of the Chicago Foundry Company. The order appointing the receiver is as follows:

'On motion of plaintiff's solicitors, it is ordered that Thomas Gillespie be, and he hereby is, appointed receiver of the property in controversy herein, upon his giving a receiver's bond in the penal sum of $10,000, with surety to be approved by the court, with all the usual powers of a receiver in chancery.'

At the time the receiver was appointed, the

foundry company owed the steel company a little over $3,000. The rolls are worth somewhat more than $1,000, and the receiver, when he took possession of the foundry company's property, took possession also of these rolls, canceled the shipping directions which had been given to the railway company, and insisted that the steel company should buy the rolls from him as receiver, and should prove up its claim for existing indebtedness against the estate of the foundry company in his hands.

When the receiver insisted upon his refusal to permit this offset, the steel company agreed with the receiver that it would take the rolls from him and would submit to the court the question of the offset at issue between the parties. This was done, and the court below has decided that the rolls in question were, at the time the receiver was appointed, the property of the steel company, and that the steel company was entitled to the benefit of the offset claimed.

From this decision two appeals have been prosecuted to this court."

On p. 598 the Court say:

"*The bill filed by the Chicago Foundry Co. conferred no jurisdiction upon the Circuit Court to appoint a receiver. Courts do not sit for the purpose of conducting private business, about which there is no controversy.* *Wheeler* v. *Pullman Iron & Steel Co.*, 143 Ill. 197; *Wrigley* v. *The People*, 51 Ill. App. 51; 155 Ill. 497; *Gilbert* v. *Block*, 51 Ill. App. 516-521.

The order appointing the receiver gave him no control over these rolls, because there was then no controversy as to them. There is no reason for doubting that had the receiver not been appointed, these rolls would, in the ordinary course of business, have been delivered, as was intended, into the actual possession of the steel company.

The receiver, without right, intervened, and prevented a completion of a delivery begun by the foundry company.

Such being the case, by agreement with the receiver, appellee submitted to the court its right to these rolls. The court has found that the steel company is entitled to them.

It does not appear that the foundry company has ever objected to the carrying out of its agreement to deliver these rolls to appellee. *The receiver, holding without right or title, has objected.* We see no sufficient reason for interfering with the action of the Circuit Court; no injustice has been done by its decision. The receiver is not in a position to complain of it. *Stanton* v. *Andrews*, 18 Ill. App. 552; *Chicago Trust Co.* v. *Caldwell*, 58 Ill. App. 219.

The other appellants, said to be creditors of the foundry company, have intervened in a matter over which the court had no jurisdiction, save by the agreement made between the receiver and the steel company; that agreement did not provide that third parties might intervene or their claims be heard.

The Circuit Court, in respect to the controversy between the receiver and the steel company, by mere agreement between them, heard and decided that dispute, which was a matter as to which, under the circumstances, the general, mere contract creditors of the foundry company, had neither *jus in rem* or *jus in re*.

The judgment of the Circuit Court is affirmed."

From the fact that the Superior Court *could not* have *tertained jurisdiction* of the bill filed by plaintiff in District Court, very important conclusions neces-rily follow:

1. If the Superior Court had *jurisdiction* of the bill d herein and pursuant to which it attempted to ap-int receivers, *then the subject-matter of said bill sim-could not be the same as the subject-matter of the filed by plaintiff in the District Court.* In such case, controversy in each court would be *different*. There ld be no conflict of jurisdiction.

2. If, on the other hand, the Superior Court did not have *jurisdiction* of the bill filed therein, *then the receivers appointed by it had no standing whatsoever in the District Court.* And whether the District Court had jurisdiction or not, such receivers cannot complain of the refusal of the District Court to turn over to them the property in its possession.

We wish to emphasize at this point that the Illinois courts, both Appellate and Supreme, expressly hold that the local chancery courts have no jurisdiction of conservation proceedings. *The District Court's jurisdiction of conservation proceedings is, therefore, necessarily exclusive. And since its jurisdiction of conservation proceedings is exclusive, it could in the exercise of such jurisdiction, lawfully seize property belonging to, and in the possession of, the Daniel Boone Woolen Mills, Inc., even though there was then pending in the Superior Court of Cook County a stockholder's bill as well as a motion for the appointment of a receiver.* A case precisely in point is that of

Moran v. *Sturges*, 154 U. S. 256.

In that case the facts were as follows:

> "On the *31st day of July*, 1891, proceedings were commenced in the Supreme Court of the State of New York for the voluntary *dissolution* of a Steam Tow Boat Company, a corporation organized under the laws of that State, *and an order was made on that day restraining creditors from bringing action and requiring all to show cause, on the 16th day of November, 1891*, before a referee, why the prayer of the petitioner should not be granted. *An order was made at the same time for the appointment of a receiver*, which required him to give bonds before entering on the duties of his office. *On the 1st of August, 1891, in the forenoon of that day, these orders were entered and the papers filed in the office of the clerk of the court.* On the *afternoon* of the

same day, which was Saturday, and on *Monday, August 3*, libels in admiralty were filed in the District Court of the United States for the Eastern District of New York to enforce maritime liens against six of the vessels of said Tow Boat Company's fleet. *On the 1st of August the marshals for the district seized and took into custody three of the six, and on the 3d of August did likewise with the other three. On the 4th of August* the receiver filed his official bond, duly approved, and entered upon the discharge of his duties. *On the same day he went to take possession of the six vessels and found them in the custody of the marshal.* Thereupon, on his motion, process issued against the several libellants, to bring them before the Supreme Court of the State, where, after hearing, they were enjoined from taking any further proceedings on their libels. This judgment of the Supreme Court being affirmed by the Court of Appeals, and the judgment of the latter court being remitted to the Supreme Court and entered there as its judgment, the libellants sued out a writ of error to this court."

The Court quoted with approval the following excerpt from *Buck* v. *Colbath*, 3 Wall. 334:

> "*It is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly.* In examining into the *exclusive* character of the *jurisdiction* of such cases, we must have regard to *the nature of the remedies*, the *character of the relief sought, and the identity of the parties in the different suits.*"

The Court then pointed out that the *District Court had exclusive admiralty jurisdiction* (pp. 276-282). On pp. 283 *et seq.* the Court say:

> "*We think it entirely clear that, as a state court is without jurisdiction to enforce maritime liens*, so

it is incapable of displacing them, and, therefore, though under the rule laid down in *Taylor* v. *Carryl*, the possession by the state court of property subject to such liens will not be disturbed, yet that court can only deal with the property subject thereto; and when its jurisdiction has determined the admiralty courts may proceed.

But upon the facts disclosed in this record, was the District Court required to stay its hand until the termination of the proceedings in the state court? It is admitted that the receiver never took actual possession of the vessels, and that he did not qualify until after the marshal had taken such possession under the libels; but it is said that, as his *appointment* was made on *July 31, before* the libels were filed, when his bond was executed, approved and filed in the office of the clerk of the court for Albany County, *his title to the property related back to the time of his appointment*, and that he had *constructive* possession as of that date, which *constructive possession* overreached the possession of the marshal.

Certain sections of the New York statutes (Rev. Stats. Part 3, c. 8, §§ 66, 67; Code Civ. Proc. 1891, App. 1167) provide that a receiver 'before entering on the duties of his appointment shall give such security to the people of the State, and in such penalty as the court shall direct'; and 'such receiver shall be vested with all the estate, real and personal, of such corporation from the time of his having filed the security hereinbefore required.'

The contention is not only that the title to these vessels vested in the receiver as of July 31, and that, in such a case as this, constructive is the equivalent of actual possession, but that although the receiver did not qualify until after the seizure by the marshal, he thereupon became constructively possessed of the vessels as of July 31, and the jurisdiction of the District Court was thereby ousted. But if jurisdiction had attached, it would not be defeated even by the withdrawal of the property for the purposes of the state court, and, moreover, the doctrine of

relation has no application. *As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute. But where the jurisdiction is not concurrent and the subject matter in litigation in the one is not within the cognizance of the other,* which actual or even constructive possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, *yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation.* That doctrine is resorted to only for the advancement of justice, and, under these state statutes, is adopted to defeat fraudulent, unwarranted and unjust dispositions of the debtor's property, and to accomplish just and equitable ends. *Herring* v. *N. Y., Lake Erie, etc. Railroad*, 105 N. Y. 340, 377.

At the time these libels were filed and the marshal seized the property, it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, and he had neither actual nor constructive possession.

The jurisdiction of the state court over the subject matter of the winding up of the corporation and the distribution of its assets did not embrace the disposition of the claims of the libellants upon these vessels, nor were they as holders of maritime liens represented by the attorney general when he assented to the order of July 31, as were creditors of that Schuyler Company were. The adjudication by that order may have so operated on the title in respect of the parties to that suit as to place the property constructively in the custody of the law as of that date, *but not as to all persons and for all purposes. Under the circumstances we are unable to accept the conclusion that simply by the institution of the winding up proceeding, property, subject to liens over*

which they could not exercise jurisdiction in invitum, was placed in such a situation in respect of liability to being ultimately brought within the custody of the court that the District Court could not obtain jurisdiction for the purpose of ascertaining and enforcing those liens in respect of which its jurisdiction was exclusive. It appears to us that the District Court violated no rule of comity nor any other rule in entertaining the libels.

The title and the right of possession as between the receiver and the creditors of the Schuyler Company may have vested as of July 31, *but this could not operate to divest a jurisdiction, not concurrent, to the exercise of which no actual impediment existed at the time it was invoked.* As has been seen, maritime liens are incumbrances placed on vessels by operation of law, and neither the death nor the insolvency of the owner can divest or extinguish them or transfer jurisdiction over them to courts for the settlement of the estates of decedents or insolvents, although for the purposes merely of such settlement these are the appropriate tribunals. In the orderly administration of justice the representatives of such estates should apply to the court which alone has cognizance to ascertain and enforce these exceptional interests in the thing itself, which accompany it wherever it goes and into whosoever hands it comes, and which cannot be displaced by the action of other courts *in invitum*."

In the case at bar the stockholder's bill in the Superior Court was filed on February *14*, 1915. The bill was brought against the *Daniel Boone Woolen Mills, Inc.*, and *its directors alone. Creditors were not made parties defendant; and if it was a mere minority stockholder's bill, then creditors would have had no standing in the Superior Court. And, of course, the United States Worsted Sales Company, a citizen of New York, could institute any proceedings it saw fit in the Federal Courts, or elsewhere.*

If, on the other hand, *the bill filed in the Superior Court was a mere conservation bill, then the Superior Court had no jurisdiction.* At any rate, *the Superior Court could not have taken jurisdiction of a bill such as was filed in the District Court.*

In the Superior Court *no receiver* was appointed *prior* to the *seizure* of the property in question by the *District Court* in a case of which the *District Court* had *exclusive* jurisdiction of the subject-matter. The decision of the Supreme Court in *Moran* v. *Sturges* turned upon the want of jurisdiction of the New York Court of admiralty causes. Inasmuch as there was not *concurrent jurisdiction;* inasmuch as the *subject-matter* of the controversy in the District Court was not the *same* as the subject-matter of the controversy in the State Court, it was properly held, that having first actually seized the vessels in question in a cause whereof it had exclusive jurisdiction, the District Court could retain such property, even though proceedings were first instituted in the State Court and a receiver had been actually appointed.

The New York statute with respect to the giving of bond by receivers is irrelevant, and was, it would seem, a mere moral make-weight.

In the case at bar the Superior Court did not undertake to appoint receivers until more than a week after the seizure of the property by the District Court. At the time of its seizure there was pending in the Superior Court a mere motion for the appointment of a receiver.

B.

That the subject-matter of the suit in the Superior Court is necessarily different from the subject-matter of the suit in the District Court has already been demonstrated as a matter of ineluctable logic, provided the Superior Court had jurisdiction at all. Since the Superior Court could not entertain jurisdiction of mere conservation proceedings such as were instituted by the United States Worsted Sales Company in the District Court, it necessarily follows that if the Superior Court had jurisdiction of the proceedings instituted in that court such proceedings could not be the same as the proceedings that were instituted in the District Court.

An examination of the original bill filed in the Superior Court on February 14, 1925, will show:

1. That it was brought by one Hurwitz against the Daniel Boone Woolen Mills, Inc., and that Hurwitz owned 100 shares of the capital stock of the said defendant.

2. That on or about November 14, 1924, the then directors and officers of said defendant were ousted.[1]

4. That about *February 12*, 1925, Byfield *re-*

[1] It is then alleged that such former officers had defrauded the public in the sale of stock in said defendant, but plaintiff does not allege when, where, from whom, or upon what representations he purchased his stock. Neither does he allege that he paid more than the shares purchased by him were worth. The foregoing allegations with respect to the fraud of *former* directors and officers are therefore irrelevant, especially in view of the fact that such persons are not made parties, and the further fact that no relief with respect to such matters is asked by plaintiff. No such allegations are contained in the bill filed in the District Court. In any aspect of the case, the allegations above mentioned are irrelevant, so far as the *character* of the bill filed in the Superior Court are concerned.

ported that he had caused an audit of the corporation's books to be made; that such audit showed a shrinkage of $3,146,101.88 in corporate assets between December 31, 1923 and February 2, 1925. That Byfield also reported that his investigation had disclosed that conditions were worse than he had expected to find them, and that after ten weeks of almost constant attention to the affairs of the corporation he was forced to admit that his original hope of being able to save the defendant corporation appeared to be impossible of realization; that *there was no limit to the involved situation;* that never before had a corporation been so thoroughly looted; that business was being carried on by means of the collection of accounts, which could not continue indefinitely, and that

> "with weekly pay rolls ranging from fifteen to twenty thousand dollars, large outlays in cash for woolens and other materials, rentals, taxes and interest to be paid *immediate action by the stockholders in the matter of financing was imperative*" (Tr. 51).

5. That Byfield and his associate officers and directors had taken no steps to recover the huge sums reported to have been converted by *former* officers and directors, and that

> "*the only course by which relief could be obtained is the immediate appointment of a receiver with ample power and direction to cause a thorough examination of all the acts and doings of those who have misapplied or misappropriated assets of the defendant corporation and to institute such legal or equitable procedure as may be necessary to secure a return to the corporation of such misappropriated property or the proceeds thereof*" (Tr. 51-2).

6. That one Oscar Gumbisky, a *former* director and officer, had published advertisements in the public press containing counter-charges against Byfield and his associates in their administration of the corporation's affairs, and that the good-will of the

corporation had suffered as a result of such charges and counter-charges (Tr. 52).

7. "That during the period from November 14th 1924, when Byfield and his associates took charge of the defendant company, and up to December 31st 1924, the defendant company sustained a loss of approximately $75,000.00, for which Byfield and his associates alone are responsible; that if the business of the company is continued under the present chaotic condition and inefficient management, with the credit of the company already shattered and practically destroyed, and no immediate assistance or protection afforded by the court, *the company will become insolvent; that if a receiver is appointed and a proper investigation made by him under the direction of the court, the money the receiver will recover from officers, directors, individuals, and corporations who have fraudulently, unlawfully and unjustly obtained portions of the assets of the company and improperly converted the same for their own use will be sufficient to discharge all liabilities of the company to rehabilitate its credit and to give it ample resources with which its good will will be restored and its financial standing re-established*" (Tr. 52-3).

8. That "*complainant and his associate stockholders have no remedy through the officers and directors for the redress of such injuries and the recovery of such losses, and their only remedy is this suit brought for the benefit of and on behalf of complainant and all other stockholders similarly situated*, and that in the interest of all concerned this court should issue its injunction or restraining order directed to the officers and directors of the company *restraining them from in any manner pledging, mortgaging, encumbering, or in any manner creating any lien upon any of the assets of the company until the further order of this court*, and that this court immediately appoint a receiver with ample power and authority *to institute a full investigation as to the assets, moneys, claims, accounts and transactions of the company and its officers, directors and agents since the company's incorporation, and that upon*

discovery of any misuse, misappropriation, diversion or unlawful transfer of the assets of the company, the receiver be authorized and directed to take all needful, legal or equitable procedure to require return to the corporation of its money, assets and property, and that said receiver be authorized and directed to report from time to time to the court and take such procedure as may be necessary to become fully possessed of all property and assets of the defendant company, *and that in the meantime the receiver be authorized and directed to continue the business of the company as a going concern and for that purpose to employ help and assistants, and direct and operate the company's business, and to employ help and assistants,* and direct and operate the company's business, and to employ experienced and capable attorneys, who, under his direction, will institute such legal or equitable proceedings from time to time as the court may direct; *that all steps of administration, management and procedure shall be taken and conducted under and pursuant to the orders of this court after full report of the condition of the affairs of the company, and that such other and further procedure may be taken as will preserve the interests of complainant and all stockholders and other persons interested in the affairs of said corporation."* (Tr. 54-5).

The plaintiff prayed for

"an accounting with all directors and officers and other persons who have had to do with the affairs of the corporation; that upon discovery of unlawful misuse, diversion or misappropriation of assets, the court order such complete and adequate procedure as will restore to the company the misapplied property and assets; *that when the company has been so repossessed of its assets, moneys and property unlawfully and fraudulently taken from it, the court direct a meeting of stockholders of the company at a date to be fixed by the court, upon due notice, as required by statute and the by laws of the company, when a new board of directors shall be chosen and shall meet and choose officers for the management of*

officers of the company, and that after such proceedure has been duly reported to the court, the receiver be directed to make his final report to the court, and upon approval thereof, be directed to turn over to such duly elected officers and directors all of the assets of the company so marshalled by said Receiver, and that complainant shall have such other and further relief in the premises as equity shall require and to the court shall seem meet;

"Complainant prays for a temporary restraining order and injunction against the *officers, directors, agents and attorneys of the company,* restraining them from making any conveyance, pledge or hypothecation of any character or description of the assets of the defendant company, or in any manner interfering with its business and affairs until the further order of this court; prayer for summons in chancery directed to the sheriff of Cook County, Illinois, to summon said Daniel Boone Woolen Mills, Inc., to appear on the first day of the next March term of the court, then and there to answer to this bill, etc., and prayer for general relief" (Tr. 54-5).

The *character* of the proceedings instituted by plaintiff is clear. Hurwitz sought to have:

(a) *The directors and officers restrained from pledging or creating a lien upon the corporate assets.*

(b) *An impartial investigation* made into conduct of the corporation's affairs by *former* officers and directors, *and legal action taken to recover any moneys lost by reason of their peculations or other wrongful acts.*

(c) The corporation's business managed by a receiver *until the main purposes of the bill, as set forth in the foregoing paragraph, should be accomplished;* and thereupon—

(d) *An election of directors and officers to receive the assets and to take over the direction and control of the corporate business.*

The bill filed by Hurwitz was *primarily* for the benefit of *stockholders only;* whereas the bill filed in the District Court was primarily for the benefit of *creditors.*

The bill filed by Hurwitz related solely to the course to be pursued with respect to *intra-corporate* matters. Its main purpose was to procure an investigation into the conduct of the corporate business by former directors and officers, and the institution of suits in behalf of the corporation against directors and officers guilty of tortious acts.

The bill filed in the District Court neither showed any such facts, nor sought any such relief.

Hurwitz did not seek a *dissolution* of the corporation. In his bill he sought to have the corporation's business *temporarily conducted with the view of its ultimate restoration to the proper corporate officers.* The bill filed in the *District Court* prayed that *all* the assets of the corporation *be sold, that the equities, rights and priorities of creditors be adjudicated, and that the proceeds of such sale be distributed among the creditors.* Hurwitz sought to insure the *existence* of the corporation. The bill filed in the District sought the *distribution of all its assets among creditors.*

Hurwitz sought to recover moneys from former directors and officers for the primary benefit of the corporation as such. The bill filed in the Federal Court was not predicated upon the wrongful acts of former directors, but asked that all assets of the corporation be conserved for the benefit of creditors to the full amount of their claims. Hurwitz sought to have the then *directors and officers* restrained from creating a lien upon the

property of the corporation. The bill filed in the District Court prayed for an injunction

> "restraining and enjoining *all persons* from *levying executions, attaching, intermeddling with or taking possession of any of the property of said defendant.*" (Tr. 9.)

Hurwitz complained of *past wrongs* by former directors and the supineness of their successors. The plaintiff in the District Court claimed money to be due and owing and based its right to relief upon *impending injuries*—the clamor of creditors, the welter of suits and the scramble for assets, if equity did not intervene.

Plaintiff in the Federal Court was concerned with the inability of the corporation to pay its creditors. Hurwitz's chief concern was the supineness of the then directors with respect to collecting money from their predecessors.

The proceedings in the District Court were typical conservation proceedings, whereas the bill in the Superior Court was a minority stockholders' bill, which involved a conflict among directors and stockholders with respect to the wholly internal affairs of the corporation. *Not an issue that could possibly be determined in the Superior Court was involved or could possibly be involved in the proceeding in the District Court.* The appointment of a receiver in either case would be merely *incidental* to the *ultimate relief* sought. And that each suit concerned the same corporation is of course irrelevant, otherwise a decree in a suit for divorce by a lawful wife against her husband could be set up as *res judicata* in an action by a third person against the husband for breach of promise or for the collection of money due on a promissory note.

It being clear that the controversy in the District Court between a simple contract creditor and the corporation was altogether different from the controversy in the Superior Court between a stockholder and the officers and directors of such corporation, let us ascertain what is the correct rule in the premises with respect to jurisdiction.

Unquestionably the best reasoned case in all the books on this subject is that of

Empire Trust Co. et al. v. *Brooks*, (C. C. A. 5th Cir.), 232 Fed. 641.

In that case the Court stated the facts as follows:

"The original bill in this cause was filed *July 31*, 1914 in the District Court of the United States for the Western District of Texas, by the appellant, the Empire Trust Company, as trustee under a mortgage, executed May 1, 1911, by the San Antonio Land & Irrigation Company, Limited, to it, against that and others of its subsidiary companies, praying for a foreclosure of the mortgage and the appointment of a receiver of the mortgaged property, pending final decree.

One Preston, a bondholder and stockholder of the San Antonio Land & Irrigation Company, had *previously*, but on the same day, filed a bill in the district court of Nexar county, Tex., the purpose of which was *the appointment of a receiver of the corporation, as an insolvent corporation under the statute of Texas, and, by an amendment, the marshalling of its assets and its liquidation under the Texas laws. The suit in the state court was filed and brought to the attention of the judge of that court some hours before the filing of the bill in the federal court, and the state court judge had prior thereto, made an order requiring the defendant corporation to show cause on August 24, 1914, why a receiver should not be appointed of the assets of the corporation.*

On *August 12*, 1914 the judge of the District Court of the United States for the Western District of

Texas appointed Floyd McGown receiver of the defendant corporation in the foreclosure suit, and he took possession of the assets of the corporation and continued in possession of them up to and after the time of the filing of the intervention of the appellee herein. On *August 31*, 1914, the district court of Baxard county, Tex., appointed the appellee, Sidney J. Brooks, as receiver of the defendant corporation in that suit, under the petition filed in that court by Preston.

On *September 23*, 1914, the state receiver, Brooks, applied to the judge of the District Court of the United States for the Western district of Texas for leave to intervene in the suit filed by the Empire Trust Company, as trustee, in that court, which leave was granted; *and appellee thereupon filed his intervention, asking that the receiver theretofore appointed in the foreclosure suit be directed to turn over the assets in his possession to the intervener, as receiver under the appointment of the state court.* This intervention came on for hearing in the District Court of the United States for the Western District of Texas on the 10th day of November, 1914, *and the District Court*, on that day, *entered into a decree in the intervention, directing the receiver McGowan, to turn over the property of the defendant corporation, in his possession as receiver, to the appellee, as receiver in the suit pending in the state court, and setting aside the previous order appointing McGown receiver in the foreclosure suit. It is from this decree that the present appeal is taken by the complainant and the receiver, McGown.* The appellee has submitted a motion to dismiss the appeal, upon the ground that the decree appealed from is not a final decree."

The opinion rendered by the court is altogether admirable for its fairness, dignity, lucidity and thoroughness. The learned writer said:

"The question presented on the merits is whether the court below properly directed its receiver to surrender the mortgaged property, of which he had taken possession, to the receiver appointed by the

district court of Bexar county, in the insolvency proceedings pending in that court. The record fails to show that the property had been delivered to the trustee under the mortgage by the defendant corporation prior to the institution of the suit in the state court by Preston. While the naked legal title to the real property was then in trustees for the defendant corporation, the record does not satisfactorily show that the mortgaged property was adversely held or possessed by such trustee or any one against the defendant corporation. Nor are we prepared to hold that the district court of Bexar county, Tex., was without jurisdiction to entertain the suit instituted by Preston therein and to appoint a receiver of the assets of the defendant corporation on his application. It is conceded that the suit in the state court was filed, and that an order, notice of which was afterwards served, was made by the judge of the state court, requiring the defendant to show cause why a receiver should not be appointed, before the filing of the foreclosure suit. *It may also be conceded that possession of the assets of the defendant corporation would have become necessary to the exercise of the jurisdiction of the state court, at least, as it was invoked under the amended petition, which prayed for the marshaling of assets and liens and a distribution of assets among all creditors, according to their priorities.* It is also true that mere irregularities in the process or procedure in the state court, which do not avail to show a want of jurisdiction, cannot be considered in the United States court.

"*At the time the District Court of the United States for the Western District of Texas appointed its receiver, and at the time the receiver qualified and took possession of the mortgage property, the district court of Nexar county had made no order appointing a receiver in the cause there pending. The Texas state court had neither actual nor constructive possession of the mortgaged property at that time. The seizure by the receiver in the foreclosure suit, subsequently filed in the federal court was therefore no interference with the possession of the state court or its receiver, since it then had*

none. The prior jurisdiction of the state court h
however, been invoked in a way that might th
after require the possession by the state court
the mortgaged property for the accomplishment
the relief prayed for in the suit there pending.
*question for determination is whether the fed
court must surrender its first acquired possessio
the state court, because the jurisdiction of the la
was first invoked in a manner which required
session of the res for its proper disposition.*

"The rule is stated by the Supreme Court in
case of *Wabash Railroad* v. *Adelbert College*,
U. S. 38-54, 28 Sup. Ct. 182, 187 (52 L. Ed. 379),
follows:

"'When a court of competent jurisdiction h
by appropriate proceedings, *taken property into
possession through its officers*, the property is the
by withdrawn from the jurisdiction of all ot
courts. The latter courts, though of concurrent ju
diction are without power to render any judgm
which invades or disturbs the possession of the pr
erty while it is in the custody of the court wh
has seized it. For the purpose of avoiding injust
which otherwise might result, a court during
continuance of its possession, as incident thereto
as ancillary to the suit in which the possession
acquired, has jurisdiction to hear and determine
questions respecting the title, the possession, or
control of the property. In the courts of the Uni
States this incidental and ancillary jurisdiction
ists, although in the subordinate suit there is
jurisdiction arising out of diversity of citizens
or the nature of the controversy. Those princip
are of general application, and not peculiar to
relations of the courts of the United States to
courts of the states. They are, however, of espe
importance with respect to the relations of th
courts which exercise independent jurisdiction
the same territory, often over the same proper
persons and controversies. They are not based up
any supposed superiority of one court over
others, but serve to prevent a conflict over the p
session of property, which would be unseemly
subversive of justice, and have been applied by t

court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the states of the Union.'

"In the case of *Palmer* v. *Texas*, 212 U. S. 118-129, 29 Sup. Ct. 230, 233 (53 L. Ed. 435), the rule is stated more broadly, as follows:

"'We think the law of this court is well established to be that *jurisdiction over the property was acquired by the state courts when the receiver was appointed, the judicial process served, and the receiver duly qualified*, although the • • • receiver had not taken actual possession of the property. This principle was recognized in *Farmers' Loan & Trust Co.* v. *Lake Street Electric Ry. Co.*, 177 U. S. 51, 61 (20 Sup. Ct. 564, 44 L. Ed. 667), in which this court said: "the possession of the *res* vests the court which has first acquired jurisdiction, with the power to hear and determine all controversies relating thereto, and, for the time being, disables other courts of co-ordinate jurisdiction from exercising like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdictions embrace the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, to administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of special importance in its application to federal and state courts.'"

"From these cases it appears that the rule may be invoked in two classes of cases: First, in cases where there has been a disturbance of the actual or constructive possession of the *res* in one court

by the officers of another court of concurrent jur
diction. *Property in the actual possession of a*
ceiver, appointed by one court, can in no event
disturbed by the action of a court of concurr
jurisdiction. It is equally true that property in
constructive possession of a receiver of one co
who has been appointed and qualified but has
reduced the property to his actual possession, c
not be taken from his custody or that of the co
appointing him by the action of any other court
concurrent jurisdiction. The rule is without exc
tion that the actual or constructive possession
one court through its receiver cannot be disturb
by another of concurrent jurisdiction. The sec
class of cases to be considered is that in wh
there is *no interference with the possession, eit*
actual or constructive, of one court by another co
of concurrent jurisdiction, but only an interfere
with the jurisdiction of one court by another of c
current jurisdiction by the taking possession by
latter of property, not in the possession actual
constructive of the former, but which may beco
necessary to the exercise of its jurisdiction in
progress of the cause pending before it. Of th
two classes, the Supreme Court said, in *Palmer*
Texas, supra:

"'Nor is this rule restricted in its application
cases where property has been actually seized un
judicial process before a second suit is institut
in another court, but it often applies as well wh
suits are brought to enforce liens against spec
property, to marshal assets, to administer trusts
liquidate insolvent estates, and in suits of a simi
nature, where, in the progress of the litigation,
court may be compelled to assume the possess
and control of the property to be affected.'

"*It seems clear that where the basis of the*
is an infringement of the jurisdiction of the co
and not an interference with its possession of pr
erty, the rule depends upon the existence of suc
conflict and is not absolute. The quoted langua
of the Supreme Court indicates that the rule, *wh*
there is no disturbance of possession, is one of li
ited and not of universal application. It is a r

of comity to be applied by the court asked to surrender its possession, only when it is shown that that court has interfered with the jurisdiction of the court asking the surrender. It was held to be merely a rule of comity by this court in the case of *Adams* v. *Mercantile Trust Co.*, 66 Fed. 617, 15 C. C. A. 1; a case in which there was a clear conflict of jurisdiction. *Where the issues in the two suits are the same, and their subject-matter substantially identical, comity and the orderly administration of justice, and the desire to avoid a conflict of jurisdiction, require of the court that last acquires jurisdiction, though it be the first to acquire possession of the property involved in the litigation, that it surrender such possession on application, to the court of concurrent jurisdiction which first acquired jurisdiction of the controversy.* This was the holding in *Palmer* v. *Texas*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435; *Farmers' Loan Co.* v. *Lake Street Ry. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; *Adams* v. *Mercantile Trust Co.*, 66 Fed. 617, 15 C. C. A. 1. *In such cases, the court making the surrender abdicates its jurisdiction over the cause, as well as surrenders possession of the res.*

"However, *where the issues in the subsequent suit are different from those involved in the first suit, and the subject-matter is not identical, there can be no infringement of the jurisdiction of the court in which the first suit is pending, by reason of the institution of the second suit in a court of concurrent jurisdiction. The only identity between the two suits in that event is that they relate to the same property, and, this being true, there is no apparent reason why the court which first acquires possession of the property should surrender its possession and thereby defeat its own jurisdiction, a jurisdiction which does not infringe upon the prior jurisdiction of the court in which the first suit was brought.*

"*Where the purpose of both suits is the same, and the relief prayed for substantially identical, the prior jurisdiction of the first court should be respected.* In the case of *Palmer* v. *Texas*, *supra*, the suit in the

state court was an action by the state to forfeit the charter of the corporation and wind up its affairs. The suit in the United States court was an action by a stockholder to liquidate the corporation. Both were substantially alike in purpose. So, in the case *Farmers' Loan Co. v. Lake Street Ry. Co., supra, the suit in the federal court was an action to foreclose a mortgage and that in the state court sought to enjoin the foreclosure.* In the case of *Adams v. Mercantile Trust Co., supra, the trustee under the mortgage was made a party defendant in the suit in the state court, so that the same issues were there presented as were involved in the subsequent suit in the federal court.*

"*An examination of each of the authorities, in which the principle of surrender has been applied to cases in which there was no interference with possession, but only a claimed conflict of jurisdiction, we believe will show an indentity of issues and subject-matter between the two suits.* The case of *McKinney v. Kansas Natural Gas Co.* (D. C.) 209 Fed. 772, is an exception.

The principal is thus stated in Gluck & Becker on Receivers, pp. 67, 68 (2d. pp. 89-91):

"'The *decisive test* as expressed by the weight of authority, *is that, when the controversy in both actions is the same, the court first acquiring jurisdiction of the controversy will retain it, and it is not necessary that it should take actual possession through its receiver of the property to obtain exclusive jurisdiction. If,* however, *the controversy is not the same, there is no conflict of jurisdiction as to the question or cause, and the court which first acquires jurisdiction over the property by actual seizure through its receiver will enforce that jurisdiction, and assume the actual possession, to which it gives the right, and until the property is seized, no matter when the suit was commenced, the court does not have jurisdiction over the property, and another court of concurrent jurisdiction may appoint a receiver, and through him take possession of the property.*'

"In the case of *DeLaVergne Refrigerating Mach. Co.* v. *Palmetto Brewing Co.* (C. C.) 72 Fed. 579, 584, 585, applying this principle, Circuit Judge Simonton said:

" 'The Counsel who argued this case with equal ability and earnestness have treated it as threatening a conflict of jurisdiction. But, as has been said, it is a question of comity. *The jurisdiction of the court over the controversy made here is unquestionable. The jurisdiction of the state court over the controversy made there cannot be disputed.* The receiver of *this* court is in *actual peaceable possession. The receiver of the state court was appointed subsequent to his appointment, in proceedings antedating those in this court * * * In view, therefore, of the fact that the controversy in the suit in this court is entirely distinct from that in the state court, and that the scope and purpose of the proceedings in the state court are not those of the proceedings in this court, connected with the fact that the receiver heretofore appointed in the main cause is in actual, peaceable possession of the property, and that the complainant holds a legal lien on the property, entitling it to its possession through a receiver, the mortgagor being insolvent, and that this court has been asked by it not to exercise an act of discretion but to give effect to a right secured to it by the Constitution and laws of the United States, the prayer of the petition cannot be granted and it is so ordered.'*

"This was said of an application by a receiver, appointed by a state court in an action, *first brought* by a stockholder for the appointment of a receiver of the corporation, to have surrendered to him the property of the corporation, which was in the *possession of a receiver in a suit for the foreclosure of a mortgage subsequently brought.*

"In the case of *Moran* v. *Sturges*, 154 U. S. 256-283, 14 Sup. Ct. 1019, 1928 (38 L. Ed. 981), the Supreme Court said:

" 'The contention is not only that the title to these vessels vested in the receiver as of July 31st, and

that, in such a case as this, constructive is the equiv
alent of actual possession, but that, although th
receiver did not qualify until after the seizure b
the marshal, he thereupon became *constructivel*
possessed of the vessels as of July 31st, and th
jurisdiction of the District Court was thereb
ousted. But, if jurisdiction had attached, it woul
not be defeated, even by the withdrawal of the prop
erty for the purposes of the state court, *and, more
over, the doctrine of relation has no application.* A
between two courts of concurrent and co-ordinat
jurisdiction, having like jurisdiction over the sub
ject-matter in controversy, the court which first ob
tains jurisdiction is entitled to retain it withou
interference, and cannot be deprived of its right t
do so because it may not have first obtained physica
possession of the property in dispute. *But wher
the jurisdiction is not concurrent, and the subject
matter in litigation in the one is not within th
cognizance of the other,* while actual or even con
structive possession may, for the time being, an
in order to avoid unseemly collision, prevent th
one from disturbing such possession, *yet wher
there is neither actual nor constructive possessio
there is no obstacle to proceeding, and action tha
taken cannot be invalidated by relation.* That doc
trine is resorted to only for the advancement of jus
tice, and, under these state statutes, is adopted t
defeat fraudulent, unwarranted, and unjust dispos
tions of the debtor's property, and to accomplis
just and equitable ends. *Herring* v. *N. Y. Lake Eri
etc., Railroad*, 105 N. Y. 340, 377 (12 N. E. 763). *A
the time these libels were filed and the marshal seize
the property it had not been developed whether o
when the receiver would or might give the securit
required and enter upon the discharge of his dutie
and he had neither actual nor constructive posse
sion. The jurisdiction of the state court over th
subject-matter of the winding up of the corporatio
and the distribution of its assets did not embrace th
disposition of the claims of the libelants upon the
vessels, nor were they as holders of maritime lien
represented by the attorney general when he a
sented to the order of July 31st, as mere creditor

of the Schuyler Company were. The adjudication by that order may have so operated on the title *in respect of the parties to that suit* as to place the property constructively in the custody of the law as of that date, *but not as to all persons and for all purposes. Under the circumstances we are unable to accept the conclusion that simply by the institution of the winding up proceeding, property, subject to liens over which that court could not exercise jurisdiction in invitum, was placed in such a situation in respect of liability to being ultimately brought within the custody of the court that the District Court could not obtain jurisdiction for the purpose of ascertaining and enforcing those liens in respect to which its jurisdiction was exclusive.* It appears to us that the District Court violated no rule of comity nor any other rule in entertaining the libels.'

"It is true the case of *Moran* v. *Sturges* is to be distinguished from this case, in that in it the state court did not have the capacity to take jurisdiction of the enforcement of maritime liens which were the subject-matter involved in the suit in the federal court, whose jurisdiction thereof was paramount and exclusive, while in this case the Texas state court had the capacity to take jurisdiction of the action to foreclose a mortgage. *The Supreme Court, however, did not limit the rule of nonsurrender to cases in which the court, asking the surrender, was shown to have no capacity to take jurisdiction of the controversy, and in which the jurisdiction of the court in possession was exclusive and paramount. On the contrary, it was held to apply as well to cases in which both courts had capacity to take jurisdiction, in favor of the court which first actually obtained it.* On pages 283, 284 of 154 U. S., page 283 of 14 Sup. Ct. (38 L. Ed. 981), the court said:

"'*As between courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference.*'

"*The court again recognizes that the rule of nonsurrender applied in cases in which the court asking*

the surrender had not actually taken jurisdiction first, though clothed with the power to do so, as well as those in which it had no potential jurisdiction by declaring the rule applicable, both in cases 'where the jurisdiction is not concurrent' and in cases where 'the subject-matter in litigation in the one is not within the cognizance of the other.' Cognizance and the want of it may be actual as well as potential.
Again the Supreme Court said:

"'The jurisdiction of the state court over the subject-matter of the winding up of the corporation and the distribution of its assets did not embrace the disposition of the claims of the libelants upon these vessels, nor were they as holders of maritime liens represented by the Attorney General, when he assented to the order of July 31st, as mere creditors of the Schuyler Company were.'

"This language is more appropriate when applied to an absence of jurisdiction in fact than to an absence of jurisdiction in law. *The Supreme Court held that a court having possession of the res is entitled to retain it (1) as against any court which has no jurisdiction of the controversy pending about it, though such court first assumed to exercise jurisdiction; and (2) as against any court clothed with jurisdiction of the controversy, provided jurisdiction was first obtained by the court in possession of the res and asked to surrender it.*

"*In this case the federal court was first in possession of the res, and is asked to surrender its possession to the state court, a court whose general competency is conceded. The propriety of the surrender must therefore depend upon which court in fact first obtained jurisdiction of the subject-matter in controversy. Conflict of jurisdiction as to the subject-matter of the litigation does not mean merely that the two suits relate to the same physical property. Moran v. Sturges holds directly to the contrary. It means that the issues involved, relief prayed for, and parties to the two suits are so substantially alike that the lis pendens of the last brought is included in the first. Unless it can be said that the issues involved, the relief sought and*

the parties to the suit in the federal court were included substantially in the lis pendens of the prior suit in the state court, the jurisdiction of the former did not conflict with that of the latter. The subject-matter of the suit in the federal court exclusively related to the foreclosure of the appellant's mortgage. In the suit as originally brought in the state court the foreclosure of appellant's mortgage was not sought. The appellant, as trustee, and the bondholders, as such, were not made parties to it. There had then been no default that would authorize a foreclosure. The attitude of the suit in the state court in these respects remained unchanged until after foreclosure suit was filed in the federal court, and its receiver had been appointed and taken possession. In the absence of the mortgagee, the state court could only have dealt with the property covered by the mortgage subject to the lien of the mortgage. It could not have sold the mortgaged property free of liens, nor could it have foreclosed the lien of appellant's mortgage in that suit as it then stood.

"*Whatever may have been its power to acquire future jurisdiction of the foreclosure of the mortgage by amendment or intervention, it had not in fact done so, when the suit in the federal court was filed. It follows that the state court did not obtain jurisdiction of the subject-matter of the suit in the federal court; i. e., the foreclosure of the appellant's mortgage, by the filing of the suit in the state court, nor had it obtained it up to the time of the filing of the suit in the federal court. The federal court, consequently, first obtained jurisdiction of the subject-matter of the foreclosure of the mortgage. In doing so it did not come into conflict with any prior jurisdiction of the state court, for it had obtained none. The federal court also first acquired possession of the mortgaged property, and this possession was necessary to enable it to exercise its first-acquired jurisdiction to foreclose the mortgage.*

"We think the principle decided in the case of *Moran* v. *Sturges* properly applies to the facts of this case, though it be conceded that the district

court of Bexar county, Tex., was clothed with general jurisdiction of actions to foreclose mortgages. We also cite in support of the right of the court first acquiring *possession* of the *res* to maintain it, as against a court in which was pending a suit, first brought, *but relating to different issues*, and the objects of which would require it to take possession of the property during the progress of the suit, the cases of *Mercantile Trust Company* v. *M. K. & T. R. R. Co.* (C. C.) 48 Fed. 351; *Compton* v. *Jesup*, 68 Fed. 263, 15 C. C. A. 397; *State Trust Company* v. *National Land Imp. & Mfg. Co.* (C. C.) 72 Fed. 575. The case of *McKinney* v. *Kansas Natural Gas Co.* (D. C.) 209 Fed. 772, is opposed to this view.

"*It is with this second class of cases that we are concerned in this case, since there was no actual or constructive possession of the res in the state court, when the receiver of the federal court assumed possession of the mortgaged property. No receiver had at that time been appointed by the state court.* *Moran* v. *Sturges*, 154 U. S. 255 284, 14 Sup. Ct. 1019, 38 L. Ed. 981. The suit in the district court was instituted by a creditor and stockholder for the purpose of winding up the corporation and distributing its assets among its creditors as an insolvent corporation under the Texas statutes. No lien was sought to be enforced in it; the creditor, who was a bondholder, did not rely on his security, or seek to have enforced the lien of the mortgage. *The trustee under the mortgage was not made a party to the proceeding in the state court.* After the suit was brought, other holders of bonds and of stock intervened, as well as certain riparian claimants; but the nature and the purposes of the suit were in no wise changed. The foreclosure of the mortgage lien was never within the *lis pendens* of the state court suit. It was always and exclusively a liquidation proceeding by general creditors under the Texas statutes.

"The suit in the District Court of the United States for the Western District of Texas sought exclusively the foreclosure of a mortgage which was a first lien on the property of the corporation. The plaintiff was the trustee under the mortgage, the defendants were the mortgagor and certain subsidiary

corporations. The record shows quite conclusively that there was no probable equity over and above the mortgage indebtedness, and that the bondholders were primarily, if not exclusively, interested in the administration of the property. They had a prior claim over the unsecured creditors represented in the state insolvency proceedings, a claim which was not within the issues or subject-matter of that proceeding. Though some of the creditors in the state suit happened to be bondholders, they were not there insisting on their security or seeking to enforce it, and so were in the attitude of unsecured creditors.

"Under the circumstances, we conclude that the issues, the subject-matter, and the relief prayed for in the two suits are so different that it cannot be said there is a conflict of jurisdiction between them. If both suits had sought the winding up of the corporation because of its insolvency, or both had sought to enforce a mortgage lien on the property of the corporation, such a conflict of jurisdiction would have existed, and possession would have been rightly surrendered to the court in which the first suit was instituted.

"Neither the rule that, in case of conflict of jurisdiction, possession should be surrendered to the court first acquiring jurisdiction of the controversy, where it is or may be required for the purposes of the litigation during its progress, nor the rule against the disturbance of the court's possession has, therefore, any application in this case.

"In addition, in this case, the persons having the prior right and probably the exclusive interest in the property, which is the subject-matter of the litigation, are the bondholders who are represented by the plaintiff in the suit in the federal court. Ordinarily the parties chiefly interested in the administration of the property should be permitted to select the forum. *It is asked, however, that the court in which the prior lien is sought to be enforced, which has full jurisdiction to enforce it, and whose receiver is in peaceable possession of the mortgaged property, acquired by him when the state court had*

neither actual nor constructive possession of it, s
render the possession to a receiver, appointed by t
state court, in a suit instituted by creditors, who
claims are entitled to payment only after those
the bondholders are fully satisfied, when to do
would defeat the jurisdiction of the federal court
foreclose the mortgage, which the plaintiff has rig
fully invoked, and remit the plaintiff, along with t
res, to the state court, to apply for leave to interve
in the insolvency proceedings to assert the lien of
mortgage in a proceeding, which had not taken co
nizance thereof.

"It appears to us that no rule of comity requir
the District Court to surrender its possession und
the circumstances indicated, if it be conceded that
case, in which there is no conflict of jurisdiction b
tween the state and federal courts, and no int
ference by the federal court with the possession, a
tual or constructive, of the state court, is one
which the rule of comity applies at all.

"The decree appealed from is reversed, and t
cause is remanded, with instructions to set aside t
order of November 10, 1914, reinstating the order
August 1, 1914, and thereafter proceed in the ca
as equity and good conscience may require."

The foregoing opinion contains all the law and t
prophets, so far as the questions involved in the case
bar are concerned. It exhausts the entire subject. S
also the cases cited on p. 5, *supra*.

The case of

Havner v. *Hegnes*, (C. C. A. 8th Cir.) 269 Fe
537,

is remarkable for the hopeless confusion of ideas it
mistakably evidences. In that case the facts were
follows:

On April 26, 1920, Hegnes (a citizen of South Dakot
filed a complaint in the United States District Court f

the Northern District of Iowa charging that the Midland Packing Company (an Iowa corporation) had fraudulently obtained from plaintiff and others promissory notes aggregating some $3,000,000. in payment of shares of capital stock of said defendant; that all the capital stock of the corporate defendant had been sold pursuant to the same fraudulent scheme; that the corporation (which was controlled by the perpetrators of the fraud) was threatening to dispose of the notes to innocent purchasers; that it was either insolvent or in imminent danger of insolvency; that the officers of the defendant had procured the promissory notes with the intention of converting the proceeds thereof to their own use and without the intention of carrying on the business of manufacturing and selling packinghouse products.

The plaintiff brought his action not only in his own behalf "but in behalf of all other creditors and stockholders of said defendant similarly situated," (p. 538), and before the appointment of the receiver 32 citizens of South Dakota, Iowa and Nebraska filed intervening petitions and asked to join with plaintiff in the relief prayed for, which was:

> (a) rescission of contracts for purchase of shares of stock;
>
> (b) cancellation of notes given pursuant to said contract;
>
> (c) judgment on such notes as were transferred to other persons by defendant;
>
> (d) an injunction restraining defendant from the sale of any notes not theretofore disposed of;
>
> (e) order requiring defendant to show cause why a receiver should not be appointed to take exclusive charge of the property and assets of the defendant;
>
> (f) general relief. (p. 539)

On the same day (April 26, 1920) the Federal C issued a subpoena and entered an order requiring defendant to show cause on May 25, 1920, why a rece should not be appoitned as prayed.*

On May 7, 1920, Havner, Attorney General of the S of Iowa, instituted an action in a State (Iowa) Court the dissolution of the defendant and the winding u its affairs on account of alleged violations of local l It was alleegd that the immediate appointment of a t porary receiver was necessary, and the Attorney Gen prayed that a permanent receiver be appointed as s as possible. (p. 539)

On the same day (May 7, 1920) the State Court pointed a temporary receiver, who took actual cust and control of the property and assets of the defend (529-40).

Thereafter, such proceedings were had in the Fed Court as resulted in an order enjoining Havner f proceeding further in the State Court, and directing State Court's receiver to turn over the property and sets of the defendant to the Federal Court's receiv who were appointed on May 25, 1920. Havner and oth appealed from the order in question (p. 540).

The Circuit Court of Appeals correctly stated that question presented to it for decision was:

> "Who is entitled to the possession of the pr erty and assets of the defendant, the receiver pointed by the State Court or the receivers pointed by the Federal Court?" (p. 540).

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*Service was had upon Stokes the general auditor of the defen on April 27, 1920, the only officer that could then be found. On 8, 1920, one Ballinger, the vice-president, was also served (pp. 539, The matter of service is immaterial under the decisions.

The Court then said:

> "The appeal *does not* present a case where the controversy or the parties are the same in different actions pending in Courts of concurrent jurisdiction." (p. 540).

And again on p. 541:

> "*The issues and parties not being the same in the present action and the one pending in the State Court*, the rule last above stated applies."

Where the *controversy* pending in two Courts *is not the same*, then there is *no conflict of jurisdiction;* and the rule as stated by this Court is, that the court that first *actually seizes* property of a defendant will hold the property until its jurisdiction of the *controversy* before such Court is exhausted. *Upon the admitted facts heretofore stated the State Court of Iowa was entitled to hold the defendant's property* because such court first *actually seized* said property. Where the *controversy* pending in two courts is *the same*, the court that first acquires jurisdiction of the *controversy* will retain jurisdiction (of the *controversy*) to the exclusion of the other court, regardless of whether the other court first seized the *res* in the exercise of *jurisdiction* (*over the same controversy*) subsequently acquired. In a word, where the controversy is *the same*, the *res* follows jurisdiction of the *controversy*. And since in conflicts of jurisdiction (over the *same controversy*) one court must necessarily yield, when it yields up the *controversy*, it necessarily surrenders possession of any *property* which it had seized in the exercise of its supposed jurisdiction of the identical *controversy* of which another court had *first obtained jurisdiction*.

The Circuit Court of Appeals *intercalated* into the

true rule (where the *controversy* is not the same) t
fiction of *constructive* possession of property:

> "Where the controversy, however, is not the sam
> the issues being different in one suit from those i
> volved in another, and the subject-matter is n
> identical, there can be no infringement of jurisd
> tion as between the courts maintaining cognizan
> of the cases. This rule rests on the ground that
> such a case there is no conflict of jurisdiction as
> the question or cause. In such cases the court wh
> first acquires the actual (or *constructive*) possessi
> of property is entitled to retain the same. *Emp*
> *Trust Co.* v. *Brooks, supra; De La Vergne Ref*
> *Mach. Co.* v. *Palmetto Brewing Co.* (C. C.) 72 F
> 579; Gluck & Becker on Receivers, *supra; Kaud*
> v. *First Trust & Savings Bank, supra;* Corpus Jur
> vol. 15, p. 1169, where cases almost without numb
> are cited in support of the rule stated." (p. 540)

The subsequent reasoning of the court is inde
curious, as well as patently fallacious.

> "The question is, therefore: Which court, t
> federal or state, first acquired actual or construct
> possession of the property of defendant? It is c
> ceded that the latter first acquired actual poss
> sion; but did the federal court, at the time the
> ceiver appointed by the state court took actual p
> session, have lawful constructive possession of t
> same? If it did, the receiver appointed by the st
> court had no authority to take possession. T
> solution of the question involved requires a cons
> eration of the exact status of the case pending in t
> federal court, and, before considering that stat
> *it is well to bear in mind, that, assuming the fede*
> *court to have jurisdiction of the question as*
> *whether a receiver should be appointed or not,*
> mere erroneous conclusion reached in consideri
> that question can effect the validity of its action
> far as the question before the court is concerne
> (p. 541)

And again:

> "The complaint filed by the plaintiff certainly *authorized the federal court*, it having jurisdiction of the parties and subject-matter, *to enter upon an inquiry as to whether a receiver should be appointed or not*. In entering upon such inquiry it did not seem to it that a heroic remedy was necessary; but it proceeded in an orderly manner, and at once upon the filing of the complaint issued an order wherein the defendant was required to show cause why a receiver should not be appointed. **This proceeding to appoint a receiver was of the same nature, in regard to the same issues, and for the same purpose, as the proceeding in the state court to appoint a receiver.** The federal court had a right to proceed in the way it did. It had the question of receiver or no receiver before it. It ought not to be the law that in such circumstances another court of concurrent jurisdiction should be able, on account of immediate necessity, to so interfere with the process of the federal court as to render its final conclusion as to the appointment of a receiver of no avail to the parties before it. If the action on the part of the state court as shown by the present record can be sustained, then any court that is proceeding according to due process of law and in an orderly manner may have its action defeated by a court which is more expeditious." (p. 542)

The fallacy of the Court's reasoning is at last clear.

In the same opinion it is stated:

> "The appeal *does not* present a case where the controversy or the parties are the same in different actions pending in courts of concurrent jurisdiction." (p. 540) And see also top of p. 541.

> "This proceeding to appoint a receiver was of the *same nature, in regard to the same issues, and for the same purpose*, as the proceeding in the State Court to appoint a receiver." (p. 542)

If the Court meant that in both cases each party sought to have the defendant corporation dissolved and its assets distributed among its creditors and stockholders,

then, of course, the statement made on p. 542 would be correct, and the statements made on pp. 540 and 541 would be incorrect. If the allegations of the plaintiff's bill filed in the Federal Court were true, then the distribution of the corporation's assets among creditors was inevitable. The corporation was a mere shell. All its capital stock had been fraudulently sold for fraudulent purposes.

But, apparently, the Court was under the misapprehension that the mere fact that in each case the appointment of a receiver was asked characterized the proceedings.[1] Of course, the fact that a *receiver* is asked in two suits does not make the *controversies the same. For instance, a court may be asked to appoint a receiver in a suit to foreclose a mortgage, or in partition proceedings, or in bankrupt proceedings, or in divorce proceedings, or on a creditor's bill, or in ejectment proceedings* and in many other proceedings of the most *disparate* nature. Yet such fact would not *characterize the nature of the proceedings*, nor render the *controversies* in two suits of a different nature the same. A receivership is

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[1] On p. 543 the Court say:

"The facts in the present case bring it far within the rule established by the cases of *Farmers' Loan & Trust Co. v. Lake St. Elevated Co., supra*, and *Mound City Co. v. Castleman, supra*, for the reason that immediately upon filing the complaint a show-cause order was issued requiring defendant to show cause why a receiver should not be appointed. The court went so far in the case referred to as to apply the rule—

'In suits of a *similar nature*, where in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected.'"

The case first above cited, arose in this circuit, and involved a conflict of jurisdiction *over identical issues*. (177 U. S. 51.)

a purely *ancillary* remedy—a mere incident to the ultimate relief sought.

The opinion of the Circuit Court of Appeals is finally rested upon the ground that the District Court first obtained "*constructive possession*" of the property and assets of the defendant corporation (p. 543).

If the controversy was the same, then the result was correct, even if the reasoning was fallacious. *If the controversy was not the same, then the result was clearly incorrect.* Despite the opinion of the learned Circuit Court of Appeals, *we do not believe that two proceedings in independent courts can be both the same and not the same.*[1]

The case of

> *McKinney* v. *Landon* (C. C. A. 8th Cir.) 209 Fed. 300,

is by the same court, and needs no comment. The opinion in the case of

> *Empire Trust Co.* v. *Brooks* (C. C. A. 5th Cir.) 232 Fed. 641,

set forth on pp. 37-52, *supra*, fully states the reasons for the correct rule, which this Court has since expressly adopted. It was always implicit in previous decisions, when read in the light of the particular facts before the court in each case and firmly established principles.

The theory of the petition filed in the District Court

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[1] The Court also cited the case of *Mound City* v. *Castleman*, (C. C. A. 8th Cir.), 187 Fed. 924, but that was a case where the suits were between the same parties or their privies, and involved a question of *res judicata*. Moreover, the whole proceedings in the C. C. A. were moot.

was that the Superior Court obtained *constructive pos*
session of the defendant's property. Here the sam
claim is made under a different name. It is said tha
there was an "arrest of property." The claim is dem
onstrably absurd.

Take, for instance, the case where the same contro
versy is pending in two courts. Assume that a bill i
first filed in, and that process is first issued by, court A
that thereafter another bill presenting the *same contro*
versy is filed in court B, which seizes the property in
volved before the appointment of receivers by court A
All talk of constructive possession or arrest of propert
is irrelevant, for the reason that *the prior filing of th*
bill in, and the issuance of process by, court A veste
such court with prior jurisdiction of the controversy. I
such cases there is a *conflict of jurisdiction* over the con
troversy; and prior jurisdiction is necessarily either ob
tained or not obtained prior to the *appointment of receiv*
ers, which is merely an order entered in a cause concern
ing a controversy of which the court has jurisdiction
either prior or subsequent.

Such talk is equally irrelevant where the controvers
is not the same. This Court expressly so held in th
case of

Moran v. *Sturges*, 154 U. S. 256,

set forth on pp. 24-28, *supra*. In that case the bill wa
first filed in the State court, which on the same day ap
pointed a receiver, but required him to give bond be
fore entering upon the discharge of his duties. There
after and before the receiver gave bond a bill presentin
a *different controversy* was filed in the Federal Cour
which first seized the property involved. The State cou

receiver thereafter gave bond, and demanded the possession of the property. It was argued that the giving of the bond related back to the filing of the bill, and that the State court receiver had *constructive* possession of the property from the time of the filing of the bill. But it was held that the argument was unsound.

The argument was unsound, because the State court either acquired or failed to acquire prior jurisdiction upon the filing of the bill and the issuance of process. Investigation disclosed the fact that the *controversies* pending in the two courts *were not the same*.

The State court acquired jurisdiction of the *controversy pending in that court* upon the filing of the bill, etc., and so the theory of relation was as unnecessary as it was futile. The Federal court, however, *acquired jurisdiction of another and different controversy;* and inasmuch as it had first seized the property involved in the two different controversies, its prior possession could not be defeated by any theory of relation.

Moreover, in that case the State court could not entertain admiralty jurisdiction, just as in the case at bar, the Superior Court could not acquire jurisdiction of conservation proceedings (pp. 13-24, *supra*). Where the controversies pending in two courts are not the same, the court that first seizes the property involved in the exercise of jurisdiction of the controversy before it, may retain possession of the property, *regardless of when the other court acquired jurisdiction* of the *different* controversy before such court.

III.

The peculiar facts in the case at bar differentiate it from the cases decided by the Circuit Court of Appeals for the Eighth Circuit, which are relied upon by the petitioners as creating a conflict of opinion.

The case at bar is ruled by Moran v. Sturges, 154 U. S. 256.

In the case of

Ward v. *Foulkrod* (C. C. A. 3rd Cir.), 264 Fed. 627,

—relied on by petitioners as giving rise to a conflict of opinion among the circuit courts of appeals—it was expressly held that the *same controversy* had been presented to the state court and the federal court (p. 633).

In the case of

O'Neil v. *Welch*, (C. C. A. 3rd Cir.), 245 Fed. 261,

the controversy presented to the two courts was in fact the same (5th syllabus).

The decisions of the Circuit Court of Appeals for the Eighth Circuit are not only contrary to the rule repeatedly recognized by this Court, but are so manifestly erroneous as to be unable to give rise to a substantial conflict of opinion.

Moreover, the peculiar facts of this case are absolutely ruled by the case of

Moran v. *Sturges*, 154 U. S. 256.

The Superior Court could not have entertained jurisdiction of conservation proceedings, just as the New

York court could have entained jurisdiction of admiralty proceedings. The principle involved in both cases is identical. The decision in *Moran* v. *Sturges*, is therefore controlling.

With respect to the matters determined in that case there is no conflict of opinion among subordinate federal courts. Even if there were such a conflict, this court could only repeat what was well said in *Moran* v. *Sturges*.

No occasion for the issuance of the writ of certiorari exists.

IV.

The petition for the surrender of the property does not predicate the alleged right of the "receivers" appointed by the Superior Court to the possession of such property upon section 37 of the Judicial Code.

The petition does not state sufficient facts to make out a case under section 37.

The proof shows that in any event section 37 is inapplicable to the facts in the case at bar.

An examination of the petition filed in the District Court for the surrender of the property held by it to the so-called "receivers" appointed by the Superior Court, will show:

1. That the jurisdiction of the Federal Court was not challenged, *except as it related to jurisdiction of the property.* In other words the jurisdiction of the District Court was attacked only upon the *hypothesis that the Superior Court first obtained exclusive jurisdiction of the property of the defendant corporation.* The District Court's jurisdiction was not challenged under Section 37 of the Judicial Code.

2. That even if it was the purpose of the petitioners to rely upon Section 37 of the Judicial Code, the allegations of the petition are wholly inadequate and fail to make out a case under said section.

Section 37 of the Judicial Code is set forth in the margin.*

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* "Sec. 37. *If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.*"

5 Fed. Stats. Annot. (2nd Ed.) pp. 288-9.

The petition filed in the District Court by the "receivers" appointed by the State alleged the institution of the proceedings in the Superior Court on *February 16*, 1925, the nature thereof, the motion for the appointment of a receiver, the alleged colloquy between the Superior Court, and counsel for the plaintiff and the defendant, the continuance of the motion, the subsequent filing of a bill in the District Court on *February 18*, 1925, the confession of its allegations, the consent to the appointment of a receiver by the defendant, and the nature of such proceedings (Tr. 16-21).

The petitioners then ask for what? Do they ask that the District Court *dismiss* the suit as required in proper cases by Section 37 of the Judicial Code? No, they do not. They ask merely for the entry of an order directing the receiver appointed by the District Court to surrender the property in his possession to the petitioners (Tr. 16). As a matter of fact, they *recognize* and *invoke* the jurisdiction of the District Court by also asking, *but not in the alternative*, for an order appointing their counsel as counsel for the Daniel Boone Woolen Mills, Inc., "to the end that said State Court Receivers may and shall control and dictate the acts and doings of said" company "as defendant in the above entitled cause." (Tr. 16-17).

The District Court *was not asked to dismiss the suit* pursuant to the provisions of Section 37 of the Judicial Code, but the jurisdiction of said Court was challenged upon the ground—upon the *sole* ground—that the Superior Court had constructive possession of the property of the defendant corporation at all times after *February 16, 1925*. The two closing paragraphs of the petition

set forth in the margin clearly show that such is th
fact.[32]

The two paragraphs amount to the same thing, excep
for the reference in the latter paragraph to the lack o
jurisdiction "*on the face of the bill*," which will be dis
cussed later. It should also be observed that the tw
paragraphs are mere *legal conclusions* based upon th
facts theretofore pleaded. Also, that the petitioners d
not assert that the District Court had no jurisdiction o
the *controversy*, but only that the said court was withou
jurisdiction to *appoint a receiver*.

---

[32] "Said State Court Receivers show that as they are advised b
counsel, and therefore charge the fact to be, by the filing of sai
bill of complaint in said Superior Court, the appearance therein a
aforesaid of said Daniel Boone Woolen Mills, Inc., *and the entr*
as aforesaid on February 16, 1925 of the motion of said Hurwit
for the appointment of a receiver in said Superior Court of Coo
County acquired *jurisdiction to determine the question of th*
propriety of the appointment of such receiver and, should it seem
fit to said last mentioned court, to appoint a receiver or receivers
of said Daniel Boone Woolen Mills, Inc., with the powers and
duties conferred upon said State Court Receivers by said order o
February 28, 1925; and *by reason of the premises said Superio*
Court of Cook County acquired, on *February 16, 1925*, *constructi*
tive possession of all of the assets, property and books of the said
Daniel Boone Woolen Mills, Inc., and the prior right and jurisdic
tion, as against any court proceeding in a cause thereafter insti
tuted to take actual possession of the books, property and account
of said Daniel Boone Woolen Mills, Inc., by and through the ap
pointment of a receiver or receivers of and for said last men
tioned company, its property, assets and books.

Said State Court Receivers Further Show that as they are ad
vised by counsel and believe and therefore charge and request
fully submit, by reason of the premises and on the face of th
bill of complaint filed herein in this United States District
Court for the Northern District of Illinois, said United States Dis
trict Court is *and was at all times from and after February 16*
1925, without jurisdiction, power or right to *appoint a receiver o*
said Daniel Boone Woolen Mills, Inc., or of any of its property
assets or records." (Tr. 21).

But it may be urged that the paragraph set forth in the margin[11] proves that the petitioners did rely upon Section 37 of the Judicial Code. Our answers to such contention are as follows:

1. If they did rely upon section 37, then why did not they ask the District Court to "*dismiss* the suit"? Why did not they ask for *the relief* granted by the section, if they were proceeding under it? That is what any lawyer would do. That they were not proceeding under said section is proved not only by their failure to ask the relief afforded by it, but by their asking the District Court to appoint their own attorneys as counsel for the corporation defendant,—doubtless in order that the previous confession and consent might be withdrawn, and that the jurisdiction of the District Court over the *suit* might *then* be attacked on the ground that a simple contract creditor has no standing in a court of equity when objection to jurisdiction is made by the defendant.

2. The petitioners in the paragraph just *preceding* the one last quoted and now under discussion had alleged the institution of the suit in the Federal Court by the United States Worsted Sales Co., the

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[11] "As said State Court Receivers are informed and believe, and therefore charge the fact to be, said Daniel Boone Woolen Mills, Inc., *voluntarily furnished* said United States Worsted Sales Co., in advance of the filing of said last mentioned bill of compliant, and after the entry and continuance, as aforesaid, of said motion in the Superior Court of Cook County, Illinois, *for the appointment of a receiver, the facts or substantially all of the facts alleged in said bill of complaint in said United States District Court, and thereby, and otherwise*, in ways and by means unknown to said State Court Receivers, *brought about the filing of said last mentioned bill, and thereafter voluntarily appeared as aforesaid*, in said United States District Court, by its President, Joseph Byfield, and said Cowan and said Barrett and Barrett (all of whom signed said written admission of facts), *and consented as aforesaid, to the appointment of such receiver*, as aforesaid, by said United States District Court *for the purpose, and with the intention of thereby defeating, avoiding and evading the jurisdiction of said Superior Court of Cook County, Illinois*, and thereby depriving the complainant in said original bill in the said Superior Court and others in the same class, of all remedy in the premises and to this end, none of the parties to said case and proceeding in said United States District Court gave any notice of said case or proceedings in said last mentioned court to said Harry Hurwitz, or to said Michael Gross." (Tr. 19-20)

confession and consent by the defendant, and the appointment of a receiver by the District Court (Tr. 19). The paragraph last *quoted* proceeds upon three propositions, neither of which is sufficient under Section 37 of the Judicial Code.

> (1) That the Daniel Boone Woolen Mills Inc., voluntarily furnished the plaintiff in the District Court "substantially all of the *facts* alleged in said bill of complaint" and "otherwise brought about the filing of" said bill.
>
> (2) That it confessed the bill and consented to the appointment of a receiver.
>
> (3) That it so confessed and consented *not for the purpose of "creating a case cognizable* * * * *under"* Section 37 of the Judicial Code, *but "for the purpose*, and with the intention of *thereby defeating*, avoiding and evading the jurisdiction of said **Superior Court of Cook County."**

Proposition No. 2 may be dismissed without further consideration, inasmuch as all conservation proceedings in the Federal Courts are based upon the confession and consent (or the failure to object, which is the same thing) of the defendant. Otherwise, there would be no jurisdiction of a bill filed by a simple contract creditor.

Proposition No. 3 is also inadequate. The purpose of Section 37 of the Judicial Code is to protect the *District Courts* from hearing causes not properly cognizable by them. But inasmuch as conservation proceedings are properly cognizable by District Courts *upon the confession and consent of the defendant*, the motive for confessing and consenting is immaterial. The petitioners do not allege:

> a. That the facts stated in the bill were not true; or
>
> b. That the persons signing said documents were not officers of the corporation; or

c. That the confession and consent were for the purpose of deceiving the *District Court*, or of foisting upon it a suit or controversy not properly within its jurisdiction.

Proposition No. 1 is also wholly inadequate. The petitioners do not allege that plaintiff's claim was not *bona fide*, or that any property or claim was transferred to plaintiff in order to procure the necessary diversity of citizenship, or that the facts alleged in plaintiff's bill were not true, or that there was any agreement that the defendant should control the proceedings in the District Court, or that the defendant should pay the costs or expenses of the litigation, or that *plaintiff* was a citizen of the State of Illinois, or that *plaintiff* colluded with the defendant.

Neither do the petitioners allege or set forth the means whereby the defendant "otherwise brought about" the filing of the bill by plaintiff. For all the *petition* shows, the defendant may have deceived the plaintiff, who may have acted in the best of faith, or may have frightened the plaintiff by exaggerating the financial distress of the defendant, which resulted in plaintiff's instituting the suit in good faith. *Or the defendant may have frankly informed plaintiff of the facts*, and thus have *brought about* the filing of the bill *because both plaintiff and defendant believed that their common interest, as well as the interests of all other creditors, would be best served thereby.*

It is not alleged that *plaintiff* had knowledge of the pendency of the proceedings in the Superior Court. *But even if it were so alleged, plaintiff's preference for the District Court—and the defendant's too—is irrelevant, so long as plaintiff was not a citizen of Illinois, had a*

bona fide claim, and the facts alleged in the petition were true. These essential matters are not attacked in the petition.

The allegation in the paragraph heretofore quoted that "by reason of the premises and on the *face of the bill*" is manifestly untenable.

Petitioners did not originally rely upon Section 37 of the Judicial Code. They relied upon the *untenable assumption that the Superior Court obtained constructive jurisdiction of the defendant's property on February 16, 1925, and the efforts of the defendant to defeat that supposed jurisdiction. These efforts consisted of admitting allegations which it could not truthfully deny, and of consenting to the appointment of a receiver which it had a perfect right to do. Petitioners do not impugn the motives, claim, citizenship, or conduct of, or the facts alleged by, the plaintiff. They do not allege anything that the defendant did except what it had a right to do. They make no attempt to show in their petition that any deceit, fraud or imposition was practiced upon the District Court.*

It is clear that in any aspect of the matter the petition fails to make out a case under Section 37 of the Judicial Code. The petition filed by the State Court "receivers" is subject to the same rules as any other pleading. *It is elementary that proof without pleading or pleading without proof is inadequate. They must correspond and be legally sufficient.* However, even if the proof be looked to, the appellants are in no better position.

B.

In the first place, the District Court heard and passed on all the evidence. The Court's decision therefore resolved all disputed questions of fact, if any, against the petitioners.

When the facts are in dispute, absence of jurisdiction must "appear to the satisfaction of the said district court". Necessarily, the whole matter rests in the sound discretion—*legal*, of course—of the District Court. And wherever jurisdiction appears, *prima facie*, on the face of the record, the person that challenges the actual jurisdiction of the court must prove the absence of jurisdiction by the clearest and most convincing evidence. In

Barry v. *Edmunds*, 116 U. S. 550,

this Court held:

> "A suit cannot properly be dismissed by a Circuit Court of the United States as not substantially involving a controversy within the jurisdiction of the court, unless the facts when made to appear on the record, create a legal certainty of that conclusion."

See also

Wetmore v. *Rymer*, 169 U. S. 115.

Hill v. *Walker* (C. C. A. 8th Cir.), 167 Fed. 241.

Now let us examine the evidence.

First, as to the *undisputed* facts. The record shows:

1. That plaintiff in the District Court was a citizen of the State of New York.

2. That it had a valid claim for $6,176.43 against the Daniel Boone Woolen Mills, Inc., a citizen of the State of Illinois, for goods, wares and merchandise sold and delivered, and that there were no offsets or counterclaims thereto.

3. That the Daniel Boone Woolen Mills, Inc., was largely indebted to divers persons; that it was without means to discharge said indebtedness or cash to meet its current pay-roll; that it had orders on hand aggregating some $400,000, and a great deal of work in process; that creditors were closing in; that great and irreparable injury would ensue and that the assets of said company would be dissipated if the property and assets were not conserved.

4. Plaintiff filed a bill in the Federal Court alleging the foregoing facts; the defendant admitted them because they were true, and the petitioners have not challenged them.

The foregoing facts make out a *prima facie* case of jurisdiction in the District Court. *They do more. They absolutely give the District Court jurisdiction, and make any inquiry into the motives of plaintiff irrelevant.*

Blair v. *Chicago*, 201 U. S. 400, 448.

Wheeler v. *Denver*, 229 U. S. 342, 350.

Re Metropolitan Railway Receivership, 208 U.S. 90.

City of Toledo v. *Toledo Rys. & Light Co.* (C. C. A. 6th Cir.), 259 Fed. 340.

Stephens v. *Ohio State Telephone Co.* (D. C. N. D. Ohio), 240 Fed. 759, 765.

Pennsylvania Steel Co. v. *New York City Ry. Co.*, 157 Fed. 440, 444.

It is said that Mr. Cowan, the attorney who appeared for the Daniel Boone Woolen Mills, Inc., in the Superior Court, stipulated that pending the disposition of the motion for the appointment of a receiver the *status quo* should be preserved. *Mr. Cowan made no such stipulation.* The colloquy between the judge of the Superior Court and respective counsel was rambling—some of it

incoherent—*but the transcript of the proceedings clearly shows that the only thing Mr. Cowan agreed to was that he would serve on counsel for plaintiff any notices or affidavits he was going to present to the Superior Court* (Tr. 58). Mr. Cowan asked that the hearing be postponed until the following Monday, but the Court ruled that the matter should be heard the preceding Saturday. (Tr. 58) *Mr. Cowan* thereupon acquiesced, *which added nothing to the efficacy of the Court's previously announced decision*, whereupon the attorney for *plaintiff* asked:

> "Saturday morning, and everything remains in status [sic] quo?"

and the Court answered:

> "Yes. *Saturday morning*, without further notice." (Tr. 58).

Even the *answer* of the Court is *ambiguous; but it is significant that Mr. Cowan did not agree that everything or anything should remain in statu quo.* Even if he had so agreed, the agreement, *read in the light of the record*, would be *limited* to the giving out of no more sensational news by the officers of the defendant (Tr. 57).

The reason why Mr. Cowan desired a continuance was clearly stated by him.[12] Mr. Byfield had theretofore reported to the *stockholders* that the matter of refinancing

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[12] "Mr. Cowan: The situation, if the court please, is this, without going into the merits of the bill, whether or not the bill sets up such grounds as would warrant this court in entering a receivership; *there are certain important matters now coming before the Board of Directors of this company, which involves some very large amount of finances, and which will be seriously interfered with, if this court undertakes to hear the application, for a receivership. I think those negotiations will be concluded, within a week* and the rights of the complainant, under this bill, will not be affected in any way at all, by allowing this matter to go over for a matter of a week or ten days. I would prefer not to argue the motion this morning, but if counsel insists upon it, of course it will be necessary for me to do it." (Tr. 56).

demanded *their immediate attention* (Tr. 51). *Plaintiff in the Superior Court so alleged.* Plaintiff's bill also alleged that

> "*unless* a receiver for all the assets of the defendant company is *immediately* appointed, after due notice to the officers and directors of said company, *such officers and directors may take precipitate and unwise procedure by creating some species of lien or pledge, or otherwise destroy the credit of the defendant company*, so that it will be impossible for the corporation to function, and its business to be longer continued as a going business." (Tr. 54). See also the prayer on Tr. 55.

Mr. Cowan's statement above quoted unquestionably was intended to allay any fears of the plaintiff's counsel with respect to the action of the officers in the matter of refinancing so far as plaintiff's rights were concerned. What he wanted was time within which the negotiations could be conducted to a tentative conclusion, without disruption by the appointment of a receiver.

The subsequent colloquy—*especially the statements made by counsel for plaintiff*—referred chiefly to *sensational publicity with respect to the alleged tortious acts of the former directors* (Tr. 56-7), *which necessarily injured the company's credit.* Mr. Cowan's agreement, if any, whether express or implied, *when read in the light of the record, the purpose of the proceeding, etc.*, must be limited to the matters above mentioned.

They and none others were *expressly* mentioned during the colloquy. *Neither counsel then had in mind proceedings by some creditor in the District Court.* Counsel for defendant then had no such intention; *and counsel for plaintiff expressed no fears of any such procedure.* If he had entertained any it is certain that he would have expressly mentioned them.

We have gone into these irrelevant matters from a sense of obligation to a reputable member of the bar.

It cannot be denied that the matters are irrelevant, so far as the *jurisdiction* of the *District Court* is concerned. Even if Mr. Cowan had expressly agreed that the *status quo* should in all things be preserved, he could not impair the right of a citizen of the State of New York to invoke the jurisdiction of the District Court. *Mr. Cowan did not represent the United States Worsted Sales Company. The said company was not a party to the proceedings.* The suit instituted by it in the District Court concerned entirely different matters. *It is undisputed that neither the United States Worsted Sales Company nor its counsel knew of the alleged agreement by Mr. Cowan* (Tr. 112, 93).

The District Court was not deceived by plaintiff, for the plaintiff knew nothing of said agreement. It was not deceived by defendant, for the allegations of plaintiff's bill were true, and could not be denied. The most that can be claimed is that a promise made to the Superior Court by Mr. Cowan was not kept. But what relevancy has such claim to the question of the *jurisdiction* of the *District Court?* None whatsoever, even if it were true.

Mr. Cowan could not shut the doors of all other courts to even the Daniel Boone Woolen Mills, Inc., so far as *other controversies* were concerned, to say nothing of shutting the doors of other courts to creditors or other persons who were not parties to the proceedings in the Superior Court.

The Daniel Boone Woolen Mills was left in the hands of its officers. They could still manage its business. The record does not show that any of the officers of the

Daniel Boone Woolen Mills were informed of the al leegd promise by Mr. Cowan, until long after the ap pointment of a receiver by the District Court. But eve if they had been informed of such promise, their subse quent actions would at most subject them to contemp proceedings in the *Superior Court*. The District Court' *jurisdiction* would remain unimpaired, for the reaso that *the essential facts necessary to such jurisdictio under the Acts of Congress existed.*

It is undisputed that negotiations looking to the pro curing of a large loan were in progress when Mr. Cowa appeared in the Superior Court, and that they subse quently failed of consummation (Tr. 82-3, 93, 99). Thi destroyed the last hope of Mr. Byfield and his associates and made inevitable court proceedings of some nature They knew that proceedings in a State court would no foreclose the possibility of bankruptcy proceedings (Tr 103). It was believed that the company's assets wer more than sufficient to pay its creditors, if the work i process and the orders on hand could be filled and *cred itors could be prevented from wrecking the company an dissipating its assets in a free-for-all fight.*

Under the circumstances, Mr. Byfield and his associ ates did what it was their duty to do. The appellant complain, not that the officers of the company, who rep resented the majority stockholders (Tr. 98-9), *agree* to the appointment of a receiver, but that they did no agree to the appointment of a receiver by the *Superio Court* in a proceeding by *minority stockholders* concern ing a purely *intra-corporate* controversy, *when to hav done so would court disaster. Creditors were not par ties to such proceedings, and the assets of the corpora tion would have been, not conserved, but destroyed b them in a free-for-all fight.*

Mr. Solomon attempted to get into communication with Mr. Grand, an attorney at St. Louis, who represented stockholders there, for the purpose of having him take action. However, Mr. Grand was then already on his way to Chicago (Tr. 104), he having seen newspaper reports of the receivership proceedings in the Superior Court (Tr. 84). Mr. Grand came to Chicago for the purpose of protecting his clients, and while here conferred with both Mr. Solomon and Mr. Cowan (Tr. 84, 105). Mr. Solomon referred Mr. Grand to Mr. Stern, of Newman, Poppenhusen, Stern & Johnston, who informed him that a *creditor's* bill, and not a stockholder's bill, should be filed (Tr. 105). Mr. Grand and Mr. Cowan so reported to Mr. Solomon, and asked him the names of creditors (Tr. 105). Mr. Solomon gave them the names of two Chicago representatives of creditors, and called Mr. Stern by 'phone. Mr. Solomon suggested to Mr. Stern that inasmuch as he knew the two representatives in question he get in touch with them. Mr. Stern told him that he could not think of doing such a thing (Tr. 105).

One of the representatives was Mr. Fred Phillipson, the *selling agent* of the United States Worsted Sales Company (Tr. 105). Mr. Solomon thereupon made an appointment with Mr. Phillipson. Mr. Solomon testified:

> "My conversation with Mr. Phillipson was I explained the position of the Boone Woolen Mills, that we had plenty of assets to take care of creditors, that we were shy of working capital, and as a result we weren't able to meet our pay roll, that in order to protect the interests of the company we would like to have the claim—I would like to have his claim to turn over to Mr. Harry Stern for the protection of the company *and creditors* and stockholders of the Boone Woolen Mills. In substance

that is all I said to him. I told him for the pur
of having a receiver appointed in the Federal C
I don't remember whether I told him there wa
application pending for the appointment of a
ceiver in the State Court. I think I told him
had been filed. I don't think I explained to him
disadvantage of the one that was pending in
State Court was that it might result in a b
ruptcy proceeding. *As to what he said, the*
thing was that he couldn't do anything without
sulting New York, that in view of my asking hi
do so, he would be willing to do so, providing he
the consent of his home office in New York; furt
more that in doing it, he had implicit confidenc
turning his claim over to Mr. Harry Stern."

Mr. Phillipson testified:

"To relate all the conversation: When I c
into the room, I was introduced to Mr. Grand
Mr. Cowan. Mr. Grand and Mr. Cowan left
room, and Mr. Solomon said he wanted me to do
a favor. I said I would if I could. *He said, th*
fairs of the Boone Wooden Mills were in bad sh
that they had a lot of rough work at the mill
couldn't get money to complete it, and that it
necessary to apply for a receiver, and that
wanted to apply for a receiver in the Federal C
for the conservation of assets for the benefi
creditors and stockholders. He says, "Will
sign a petition for me to do that?' I says, '*I c*
sign a petition, Frank, without authority from
York.' 'Well,' he said, 'Would you do it if you
it,' *because*, as he said, *it was for the benef*
creditors and stockholders; and I said, 'You ha
show me.' Then he called Grand and Grand c
back into the room and told me that he was an a
ney from St. Louis, representing stockholders
told me about this thing, and that he thought it
the only thing to do so far as stockholders and
as far as creditors were concerned. • • •

Nobody asked me to go over to Johnston's o
I forgot to tell you that when I came into the r
I was talking to Mr. Solomon, Mr. Grand said

the thing to do was to apply for a receiver in the Federal Court, and he mentioned Newman, Poppenhusen, Stern and Johnston. *Mr. Harry Stern of this firm was a personal intimate friend of mine, and I said I would like to talk with Stern before I called New York on the long distance.* I got Harry Stern at his office and told him I would like to see him for about twenty minutes. He said, 'Hurry over.'[13] I told Mr. Stern that I was in Mr. Frank Solomon's room and that Solomon was talking to me about the receiver of the Boone Woolen Mills, and I said to Mr. Stern, '*Will you represent me if I go into this thing?*' He said, 'Certainly, why not?' Mr. Stern is a personal friend of mine, and he didn't say anything about the charges or anything else, and I didn't say anything about them, knowing that the charge would be all right, if any was to be made." (Tr. 95-6).

It therefore appears:

1. That Mr. Phillipson did not have authority to institute the proceedings. He was only a *sales agent* (Tr. 94) and he expressly informed Mr. Solomon that he had no authority to act in the absence of instructions from his principal.

2. That both Mr. Solomon and Mr. Grand informed Mr. Phillipson that such proceedings were necessary, and that they would be for the best interests of both *creditors* and stockholders alike.

3. That Mr. Phillipson asked *to be shown*. While he was willing to do Mr. Solomon a favor if he could, *his first duty was to his principal, and he not only informed Mr. Solomon that he had no authority, but asked to be shown that it was to his principal's interest.*

4. That Mr. Grand was then called in, and explained why a receivership was to the interest of both creditors and stockholders.

5. *That Mr. Phillipson personally employed Mr. Stern and procured his advice.*

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[13] It was very late in the afternoon (Tr. 105).

The case of

Cashman v. *Amador and Sacramento Canal Co.*
118 U. S. 58,

cited by appellants would be in point, if the plaintiff in the case at bar were representing some *resident creditor* who had no standing in the District Court, upon the promise of such resident creditor to employ counsel, conduct the litigation and save plaintiff harmless against any costs or expense and upon plaintiff's agreement that it would not compromise, settle or dismiss the suit without such resident creditor's consent.

Let it be assumed for the purposes of argument that the bill filed in the District Court contains no allegation that the indebtedness of the defendant to the plaintiff is due. The immaturity of an obligation is a defense that may be waived.[1] Such defense was waived in the case at bar by the defendant, Daniel Boone Woolen Mills, Inc., which not only failed to interpose any such defense, but admitted the indebtedness and expressly consented to the appointment of a receiver. The defendant corporation having waived such defense, no one else—particularly the so-called "receivers" appointed by the Superior Court—may object.

Hollins v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 380, 14 Sup. Ct. 127, 128, 37 L. Ed. 1113.

Horn v. *Pere Marquette R. Co.* (Cir. Ct. E. D. Mich. S. D.), 151 Fed. 626 and cases cited—Opinion by Lurton, C. J.

Citizens Bank & Trust Co. v. *Union Mining & Gold Co.* (Cir. Ct. N. D. Ga.), 106 Fed. 97.

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[1] 1 Corpus Juris, p. 1151, § 206:

"Except as otherwise provided by statute as in the case of attachments, the general rule is well settled that an action prematurely commenced before the cause of action has accrued, as upon a debt or demand not yet due, is prematurely brought and cannot be maintained, *provided an objection on this ground is properly and seasonably interposed.*"

Moreover, the appellants below did not challenge the sufficiency of the bill either in the petition filed by them (Tr. 16-22), *or in their assignment of errors* (Tr. 152-155), *or in their Opening Brief. They introduced no evidence whatsoever as to whether plaintiff's claim was or was not due at the time the bill was filed. It is too clear for argument that they cannot raise this question for the first time on appeal, especially in their Reply Brief.* In

1 Corpus Juris, p. 1152, Sec. 398,

it is said:

> "An objection to the premature commencement of an action must be made in the court below, and cannot be urged for the first time on appeal."

Furthermore, the immaturity of an obligation has nothing whatsoever to do with the *jurisdiction* of the court.

In

1 Corpus Juris, p. 1152, Sec. 399,

it is said:

> "*The premature commencement of an action is not a jurisdictional matter, but is one which may be waived, as by a failure seasonably to interpose an objection upon this ground; and it is ordinarily held that if defendant, without objection, appears and pleads to the merits of the action, he cannot thereafter object that it was prematurely commenced.* An objection to a premature commencement may also be waived by a tender in court, or a stipulation for a reference; and it is held that the error or defect may be cured by the filing of an amended or supplemental complaint after the cause of action has accrued, or by an agreement to waive errors, *or by a confession of judgment*, although it has been held that the defect is not cured by a judgment by default."

The petition asked for the surrender of the defen
ant's property, not upon the ground that the bill filed
the plaintiff was defective or insufficient, nor upon t
ground that the District Court was without jurisdicti
of the subject matter, but solely upon the assumpti
that the Superior Court first obtained *constructive* p
session of the property of the defendant corporation.

The jurisdiction of the District Court, either as su
or as a court of equity, was not attacked in the petiti
Except for the supposed prior and exclusive *construct*
possession of the defendant's property by the Superi
Court the jurisdiction of the District Court was not
tacked. The petitioners merely asked that the Distr
Court surrender such property. They *cannot attack*
jurisdiction of the District Court either as a fede
court or as a court of equity for the first time on appe

But even if the appellants' petition had attacked
jurisdiction of the District Court in all respects, the
sult fould not be different.

It is undisputed that the plaintiff United Stat
Worsted Sales Company is a citizen of the State of N
York, and that the defendant Daniel Boone Woolen Mi
Inc., is a citizen of the State of Illinois. The requis
diversity of citizenship therefore existed.

The amount of the defendant's indebtedness to
plaintiff was more than $6,000.00. Hence the amount
volved was sufficient. Even if it be assumed that
bill contained no allegation that the indebtedness w
due, such defense was waived by the defendant, and
one else may complain. Moreover, the immaturity of
obligation is not jurisdictional.

It was averred in the bill filed in the District Court that the defendant was commercially insolvent; and the court was asked to conserve, administer and distribute its assets among creditors. It is clear that the District Court had jurisdiction of the subject matter

> "because the administration of the assets of an insolvent corporation is within the functions of a court of equity * * *"[*]

Another function of a court of equity is the protection of valuable rights in imminent danger of impairment or destruction, especially where common law courts can offer no speedy or adequate remedy.

In

15 Corpus Juris, p. 729, §21,

it is said:

> "Jurisdiction of the subject matter, means not simply jurisdiction of the particular case then occupying the attention of the court but jurisdiction of the class of cases to which the particular case belongs."

And again:

> "Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong; the power to deal with the general subject involved in the action; and, as used in the constitutions and statutes, the word 'jurisdiction' means jurisdiction as to subject matter only, unless an exception arises by reason of its employment in a broader sense. *Such jurisdiction the court acquires by the act of its creation, and possesses inherently by its constitution; and it is not dependent upon the sufficiency of the bill or complaint, the validity of the demand set forth in the complaint, or plaintiff's right to the relief de-*

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[*] *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 380.

manded, the regularity of the proceedings, or the correctness of the decision rendered.

"A party has the legal right to bring his action in any court which has jurisdiction of the subject matter and can obtain jurisdiction of the parties." (pp. 734-36, §35).

See particularly

Brown v. *Lake Superior Iron Co.*, 134 U. S. 530, 534.

Hollins v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 480.

Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491, 500.

Reynes v. *Dumont*, 130 U. S. 354, 394-5.

Kilbourn v. *Sunderland*, 130 U. S. 505, 514.

Sage v. *Memphis and Little Rock R. R. Co.*, 125 U. S. 361, 375,

where the propositions above discussed are expressly passed upon.

The fact that the plaintiff was a simple contract creditor was waived by the defendant, and, of course, the so-called "receivers" of the corporate defendant have no other or greater rights than said defendant. In other words, the case here is in substance precisely like

Brown v. *Lake Superior Iron Co.*, 134 U. S. 530, 534,

where the corporate defendant first consented to the appointment of a receiver at the instance of creditors (one a judgment and the others simple contract, with immature claims), and thereafter sought to withdraw its assent. If the Daniel Boone Woolen Mills, Inc. would be estopped now to attack the jurisdiction of the Dis-

trict Court on the ground that the plaintiff was a simple contract creditor with an immature claim, certainly the "receivers" appointed by the Superior Court would be estopped. What the corporation did, they have done, —if the order appointing them be not wholly void. Furthermore, in the very petition the jurisdiction of the District Court was recognized and *invoked*. The appellants asked

> "for leave to substitute said State Court Receivers' attorneys, Messrs. Blum, Blum & DeLaney, as solicitors in the above entitled cause for said Daniel Boone Woolen Mills, Inc., to the end that the said State Court Receivers may and shall control and dictate the acts and doings of said Daniel Boone Woolen Mills, Inc., as defendant in the above entitled cause." (Tr. 16).

In

15 Corpus Juris, p. 845, § 164,

it is said:

> "But where the court has general jurisdiction of the subject matter a lack of jurisdiction of the particular case may be waived by failure to make timely and specific objections, *or an invocation of or submission to the jurisdiction may raise an estoppel to deny such jurisdiction. So also the parties may, either expressly or by their conduct, waive objections to remedies pursued in courts having jurisdiction of the subject matter.*"

Plaintiff's bill contained the following averments:

> "*The defendant is indebted to the complainant* for goods, wares and merchandise heretofore sold and delivered by the complainant to the defendant in the sum of Six Thousand One Hundred seventy-six dollars and forty three cents ($6176.43); no part of which has been paid, and there are no offsets or counter-claims thereto." (Tr. 3).

The ordinary meaning of *indebted* is "*owing* • • • *the amount owed* • • • as the indebtedness of an individual or corporation." (Century Dictionary.)

Indebtedness was used in this sense by Mr. Jus
Brandeis in *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 4
500, where it was said:

> "The case at bar is also unlike *Re Metropoli*
> *Railway Receivership*, 208 U. S. 90, 109, 110,
> many others, in which there was express consent
> the corporation to the appointment of the receiv
> or where *indebtedness* to plaintiff and the cor
> ration's insolvency were admitted, or the lack
> jurisdiction in equity was waived."

In that case the plaintiff's claim was mature.

It is true that "*indebted*" has a secondary meani
But as a reference to "Words & Phrases" will pro
the courts are not in accord with respect to its te
nical meaning. For instance, in

Slutts v. *Chafee, et al.*, (Wis.) 4 N. W. 763, 7

it was said:

> "The plaintiff alleges, or states that the defe
> ants are indebted to him for the value of the st
> which he lent them, and which they have never
> turned. *The word 'indebted' is significant, for i*
> *a legal term, having a legal meaning, and implie*
> *debt presently payable.* It was so defined by t
> court in *Trowbridge* v. *Sickler*, 42 Wis. 417."[14]

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[14] In

Lum v. *Buckeye*, 24 Mass. (2 Cushm.) 564, 566,

it was said:

> "A party, either in legal or common acceptance, can only
> said to be *indebted* to another *when he withholds from him*
> *which is his due*, which he is *then* bound to pay, and the other
> a right to demand. When only under an obligation to pay
> future time, he becomes indebted by a failure to pay at the
> stipulated, but he cannot be said to be indebted until the da
> payment, because until then he does not withhold that whic
> another's due, and which he has a right to demand."

And in the case of

In re Board of Rapid Transit R. R. Com'rs, 49 N. Y. 8
60, 69:

> "Ordinarily the term 'indebtedness' imports a sum of m
> arising upon a contract, express or implied. In its more gen
> sense, it is defined to be that which is due from one person to
> other, whether money, goods, or services; that which one perso
> bound to pay or perform to another."

V.

The Superior Court was without jurisdiction to appoint receivers.

If the order of the Superior Court appointing receivers was *void*, then, of course, the decision of the District Court must be affirmed. We of course pass over the manifold defects in both bills, which are irrelevant so far as the jurisdiction of the Superior Court is concerned. We base our argument upon a decision of the Supreme Court of Illinois (which is binding upon this court) that the Superior Court has no jurisdiction to appoint receivers of corporations except under Sections 52-54 of the Corporation Act of 1919. The bills filed in the Superior Court do not invoke or show the existence of facts sufficient to authorize the Superior Court to proceed under said act.

The decision we refer to is that of

> *Blanchard Bro. & Lane* v. *The S. G. Gay Co.* 289 Ill. 413.

See, also, the following cases:

> *Coquard* v. *National Linseed Oil Co.*, 171 Ill. 480, 485.
>
> *The People* v. *Weigley*, 155 Ill. 491.

If the Superior Court was without jurisdiction to appoint receivers under the bills filed therein, then, in any case, the order of the District Court must be affirmed.

> *Hammock* v. *Loan and Trust Co.*, 105 U. S. 77, 86.
>
> *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 640.

It is clear, therefore, that the petition herein should be denied.

Respectfully,

RALPH F. POTTER,
EDWARD R. JOHNSTON,
HENRY JACKSON DARBY,
Solicitors for Respondents

APPENDIX.

CORPORATION ACT OF 1919.

"§ 51. Stockholders shall not be held liable for the debts of a corporation (incorporated under the law of this State) because of any unpaid portion of stock liability, until the corporation has been adjudged bankrupt, or an execution upon a judgment or decree of a court of record for the payment of money, after demand made by the officer, has been returned 'no property found' or has remained unsatisfied for ten days after such demand, or the corporation has dissolved or ceased doing business, leaving debts unpaid."

2 Callaghan's Illinois Statutes Ann. Ch. 32, ¶ 51, p. 1916.

"§ 52. After such adjudication of bankruptcy, or after the execution has been so returned, or after ten days subsequent to such demand, or after such dissolution or cessation of business, the officer of the corporation who has charge of the stock records of the corporation, on request of any creditor of the corporation, or his attorney, shall furnish to him a certified list of the names and postoffice addresses of the officers and directors of the corporation and of all persons who were stockholders at the time when the liability to be enforced against them personally accrued, the number and character of shares held by each stockholder and the amount remaining unpaid on their respective shares. In case of failure to furnish such list within three days after such demand, a petition may be presented to the judge of any court of general jurisdiction of the county in which the

principal office of such corporation is located, who sh
have jurisdiction, after two days' notice to such offic
to enter an order directing the delivery of such list.
failure to comply with such order may be treated as c
tempt of such court and published accordingly."

2 Callaghan's Illinois Statutes Ann. Ch.
¶ 52, p. 1925.

"§ 53. After an adjudication of bankruptcy, or aft
an execution has been so returned, or has remained u
satisfied for more than ten days, after a demand mad
or after dissolution or cessation of business leavi
debts unpaid, any creditor may bring suit in equity,
any court having general jurisdiction in the county wi
in which the principal office of the corporation is locat
on behalf of himself and of all other creditors of the c
poration, against all persons who are liable in any w
for the debts of the corporation, by joining the corpo
tion in such suit. Each stockholder may be required
pay his *pro rata* share of such debts and liabilities,
the extent of the unpaid portion of the stock, after e
hausting the assets of such corporation. If any sto
holder shall not have property enough to satisfy h
portion of such debts or liabilities, then the amount sh
be divided among all of the remaining solvent sto
holders to the extent of their then unpaid stock li
bility."

2 Callaghan's Illinois Statutes Ann. Ch.
¶ 53, p. 1925.

"§ 54. Courts of equity shall have full power,
good cause shown, to dissolve or close up the busine
of any corporation, to appoint a receiver therefor w
shall have authority, by the name of the receiver of su

corporation (giving the name) to sue in all courts and do all things necessary to closing up its affairs as commanded by the decree of such court. Such receiver shall, in all cases, be a resident of this State, or a corporation authorized to act as receiver, and shall be required to enter into bond payable to the People of the State of Illinois, for the use of parties interested, in such penalty and with such sureties as the court, in the order of decree appointing the same, may require. In all cases of suits for or against such receiver, or the corporation of which he may be receiver, writs may issue in favor of such receiver or corporation, or against him from the county where the cause of action accrued to the sheriff of any county in the State for service."

2 Callaghan's Illinois Statutes Ann. Ch. 32, ¶ 54, p. 1930.

Office Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

No. [redacted] 117

DANIEL V. HARKIN AND UNION BANK OF CHICAGO,
RECEIVERS, ETC.,
Petitioners,

vs.

EDWARD J. BRUNDAGE, RECEIVER, ETC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ADDITIONAL BRIEF FOR RESPONDENT RECEIVER.

RALPH F. POTTER,
Solicitor for Edward J. Brundage, Receiver, Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1926.

No. 609.

DANIEL V. HARKIN AND UNION BANK OF CHICAGO, RECEIVERS, ETC.

vs.

EDWARD J. BRUNDAGE, RECEIVER, ETC., *et al.*

ADDITIONAL BRIEF FOR RESPONDENT RECEIVER.

While relying upon the joint answer of respondents heretofore filed, the receiver begs the indulgence of the Court to present this brief summary of facts.

On February 19, 1925, a simple contract creditor filed its bill in equity in the District Court on behalf of itself and all other creditors averring the inability of the defendant corporation to pay its debts or to meet its pay roll and continue operation, the possession of a large quantity of raw material and goods in process of manufacture, the existence of judgment and matured mortgage indebtedness, the pendency of an attachment suit for $25,000 with others threatened, that its demand and past due paper in the amount of $100,000 was outstanding, that a warrant for unpaid Federal taxes was in the

hands of deputy collectors, and that its assets would be wasted and its good will dissipated unless the court took charge of its affairs. The prayer was that a receiver be appointed to take possession of defendant's property and continue the business until the further order of the court, that such receiver marshall the assets and liquidate the same under the direction of the court, and with the proceeds pay the debts and make distribution as directed by the court. On the same day the defendant filed an answer admitting the allegations of the bill and consenting to the appointment of a receiver in accordance with its prayer. This respondent was forthwith appointed receiver and immediately qualified.

Upon the presentation of the bill counsel for the plaintiff informed the District Court that a minority stockholder had filed a bill against the same defendant in a state court sitting in the same federal district, alleging dissension among the officers and stockholders, waste and embezzlement by previous officers and failure of present officers to take action against their predecessors, and praying that steps be taken under the direction of the court for the recovery of diverted and misappropriated assets, that an election of corporate directors and officers be held under the direction of the court, and that thereafter the receiver be directed to turn over the assets to such newly elected directors and officers. The District Court was further informed that a motion to appoint a receiver had been made in the state court and continued for hearing until February 21, 1925. (Rec., 112.)

On February 21, 1925, the United States District Court for the District of Connecticut appointed ancillary receivers for the property of defendant in its jurisdiction, and on March 12, 1925, an ancillary receiver was ap-

pointed by the United States District Court for the Southern District of Iowa. (Rec., 113.)

No action was taken by the state court on February 21, 1925. The bill then on file misnamed the defendant (Rec., 114), and was so hastily and crudely drawn that although its averments suggested the advisability of a receivership, its prayer contained no petition for the appointment of a receiver. (Rec., 123-124.)

On February 28, 1925, nine days after the appointment of a receiver by the District Court, the state court appointed the receivers appearing as petitioners here, an intervening petition by another stockholder having been filed on February 25th advising the state court of the proceedings had in the United States District Court and repeating the allegations and prayer of the original state court bill. (Rec., 68.) It was not until March 13, 1925, that any pleading filed in the state court contained a formal prayer for the appointment of a receiver. On that date the plaintiff in the original bill and the petitioner in the intervening petition, filed a so-called "Engrossed, Amended and Supplemental Bill." (Rec., 70.)

On March 13, 1925, more than three weeks after the appointment of the District Court receiver, the receivers appointed by the state court filed their petition in the District Court praying for an order upon the receiver to turn over to the petitioners all defendant's property in his possession or under his control, and for leave to substitute petitioners' attorneys for counsel representing the defendant in the District Court in order that petitioners might "control and dictate the acts and doings" of the defendant in the District Court. (Rec., 16-17.) In support of the prayer of the petition it recites the filing of the original bill in the state court and the motion there

on February 16th for the appointment of a receiver; leges that upon the presentation of the motion the att ney appearing for the defendant asked for a continua pending certain negotiations for financing, whereu the court said that the status quo should be preserv and with that understanding the matter would stand c tinued to February 21, 1925, to which defendant's att ney assented; relates the proceedings in the Uni States District Court above detailed and avers on inf mation and belief that the defendant furnished the pla tiff in the District Court with the facts set up in its and otherwise brought about the proceedings in the D trict Court for the purpose of avoiding the jurisdict of the state court; sets out subsequent proceedings the state court and states that petitioners are advi by counsel that the state court acquired jurisdiction the question of the appointment of a receiver and c structive possession of defendant's assets by the p ceedings of February 16, 1925; and that by reason of premises and on the face of the bill filed in the Uni States District Court, that court was without juris tion or power after February 16, 1925, to appoint a ceiver. (Rec., 16-21.)

After the filing of answers by all parties a full hear was had in the District Court, at which the testim of witnesses was taken, the pleadings and orders in state court were presented, and a complete transcript the proceedings there on February 16th, was introduc (Rec., 55-58.) No evidence was adduced tending to sh any misrepresentation or concealment in connection w the District Court suit, or any lack of good faith in plaintiff's claim, or any collusive making or joining parties. (See Respondent's Answer, pp. 68 *et seq.*)

The petition of the state court receivers to turn o to them the property being administered by the Uni

States District Court was denied and on review by the Circuit Court of Appeals the order was affirmed. In addition to the opinion of the Circuit Court of Appeals (Rec., 169), the attention of the court is respectfully directed to the opinion of Judge Wilkerson, who observed the witnesses and considered the evidence in the light of their oral testimony. (Rec., 134.)

It is before the court upon the petition to advance the cause for hearing, that a dividend has been paid to creditors, and that there is no reasonable prospect that assets in the receivers' custody will pay claims in full.

It is respectfully submitted that the orders of the District Court and the Circuit Court of Appeals should be affirmed.

RALPH F. POTTER,

Solicitor for Edward J. Brundage, Receiver, Respondent.

MAR 12 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 117

DANIEL V. HARKIN AND UNION BANK, RECEIVERS,
Petitioners,

vs.

EDWARD J. BRUNDAGE, RECEIVER, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR MODIFICATION OF OPINION AND OTHER RELIEF.

EDWARD R. JOHNSTON,
Pro se.

BYRON S. ADAMS PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States

No. 117; October Term, 1927.

DANIEL V. HARKIN, ET AL., RECEIVERS,
Petitioners,

vs.

EDWARD J. BRUNDAGE, RECEIVER, ETC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

NOTICE.

To Lloyd Whitman, Esq., and Bernhardt Frank., Esq., counsel for petitioners:

You are hereby notified that on Monday, March 12, 1928, at 12 o'clock noon, or as soon thereafter as counsel can be heard, at the Supreme Court of the United States, in Washington, D. C., the undersigned Edward R. Johnston will move the Supreme Court to file his petition for a modification of its opinion rendered February 20, 1928, in the cause therein entitled *Harkin et al.* v. *Brundage et al.*, and for other relief, a copy of which petition is hereunto annexed.

EDWARD R. JOHNSTON,
Pro Se.

We hereby acknowledge timely service of the notice of the above motion and copy of said petition.

LLOYD C. WHITMAN,
Counsel for Daniel V. Harkin et al., Receivers.

IN THE

Supreme Court of the United States

No. 117; October Term, 1927.

DANIEL V. HARKIN and UNION BANK OF CHICAGO, Receivers, Etc.,

Petitioners,

vs.

EDWARD J. BRUNDAGE, Receiver, Etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION OF EDWARD R. JOHNSTON, A MEMBER OF THIS BAR, FOR A MODIFICATION OF THE OPINION AND FOR OTHER RELIEF.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward R. Johnston, a member of the Bar of this Court, respectfully asks:

I. For a modification of certain expressions in the opinion in *Harkin* v. *Brundage* (No. 117, Oct. Term, 1927), delivered February 20, 1928; which expressions are, or may be construed as, critical of the professional conduct of your petitioner and/or of his late partner, Henry L. Stern, who died on February 22, 1928, without knowing of the rendition of the opinion.

II. For this Court, if it deems it desirable, to make such further full and complete investigation (through any medium or machinery it considers appropriate): (1) of your petitioner's every act in connection with that case; and (2) of any and all other facts in connection therewith—all to the one end, that this Court, with the fullest possible direct light on the subject, may form its deliberate opinion of your petitioner's professional conduct in the premises.

REASONS FOR MODIFICATION OF THE OPINION.

Your petitioner requests that the opinion be modified in the following particulars:

1. By modifying the following italicized words, so that they will not be construed as including Mr. Johnston or Mr. Stern (Opinion, p. 11):

> "Cowan was its lawyer and a member of the Executive Committee of its directors. He sought and procured the continuance in the State Court. He continued to act as that Company's attorney in his dealings with Grand and in the conferences between Stern and Johnson. When the form of the bill was changed from a stockholder's bill to a creditor's bill *they all, including* Cowan, hunted for a nonresident creditor to consent to file the bill."

because neither Mr. Johnston nor Mr. Stern ever engaged in any sort of hunt for a creditor to act as plaintiff; but on the contrary, Mr. Stern refused to have anything to do with securing a plaintiff to act, and even declined to request his personal friend (Phillipson) to have his company file the bill. (Rec. 105.)

(1) Mr. Johnston knew nothing of the proposed litigation, and had nothing whatever to do with it until *after* Mr. Stern had been retained by Mr. Phillipson to bring the suit in the name of the United States Worsted Sales Co., subject to the latter's approval. (See testi-

mony of Cowan, Phillipson and Solomon as to when they first met Johnston, Rec. 89, 95-96, 106-107.) Indeed, Mr. Johnston had never met, or had anything to do with, Phillipson, Grand, Solomon or Cowan in connection with the Daniel Boone Woolen Company matter prior to Phillipson's employment of Stern and the actual preparation of the bill.*

(2) Mr. Stern, acting for an entirely outside client, had obtained, some 30 days before, confidential information about the Daniel Boone Woolen Mill's affairs from Mr. Byfield, its then president. When Grand approached Stern, looking to Stern's employment, Stern called up Byfield and stated that he would not use any of the information he had thus obtained without Byfield's consent. Thereupon Byfield consented to the use of the data by Stern. (Rec. 100.)

Stern declined to have anything to do with soliciting any creditor to act as plaintiff. (Rec. 105.)

Solomon testified that after Solomon, Cowan and Grand had searched the company's records to find a proper creditor plaintiff (Rec. 105):

> "After the two names had been mentioned, the next thing that occurred was that I telephoned to Mr. Stern, right from the room there, and told him I thought he knew both of these gentlemen (DeLee and Phillipson) and suggested his getting in touch with them. *He said he couldn't consider doing any such thing*, that it was against the ethics of a legal profession for a lawyer to solicit a claim, *and that he was in no way interested in getting in touch.*"

Solomon further testified that he then telephoned Phillipson, saw him in person, and asked him to have his company file the bill. (Rec. 105, 106.) Phillipson after discussing the matter rather fully with Solomon, Grand

*Mr. Cowan was the only one of the men named whom Johnston had ever met and Johnston saw him for the first time in connection with this litigation when the bill was being drawn. (Rec. 89.)

and Cowan consented to have his company act, provided its officers were willing, and telephoned Stern and employed him. (Rec. 96.)

In the evening of that same day, Cowan, Grand, Phillipson and Solomon, went to Stern's office, where, *for the first time*, they saw Mr. Johnston, who in the meantime, at Stern's request, had begun the preparation of a creditor's bill. (Rec. 89, 95-96, 106-107.)

This testimony demonstrates that Mr. Johnston had nothing whatever to do with the hunt for a creditor to act as plaintiff; but, like Mr. Stern, acted only *after* Grand, Cowan, and Solomon had first secured Phillipson's company to act and Stern had been employed.*

II. By adding to the following passage from the opinion (p. 11):

> "The complainant *knew* through Cowan, the fraud by which delay had been secured in the State Court. It was charged with knowledge of that fraud. The *other agents* whom it employed to bring about the result, *even if* they did not know the means taken to secure the delay, were affected with knowledge of it, because they were acting for the Woolen Mills Company in this transaction in its pursuit of a Federal Court receivership."

such explanatory statement as will make it plain that Mr. Johnston and Mr. Stern were *not* meant to be included within the above term "other agents" (or if they were intended to be so included), then, that they had no *actual* knowledge of the fraud that had been perpetrated upon the State Court.

Mr. Johnston knew nothing of the colloquy between

*The statement in Johnston's affidavit (Rec. 111) that he prepared the bill of complaint "from information, most of which had been in possession of affiant for more than 30 days prior to the preparation of said bill," referred to the data furnished by Mr. Byfield to Stern in connection with a proposed purchase by Stern's client of the Boone Woolen Mills (Rec. 100). The affidavit is not technically correct. It should have read "in the possession of affiant's *firm*."

Cowan, Gesas, and the State Court, nor indeed anything that had happened there, except the fact of the filing of the bill, making of the motion for a receiver and its continuance (Rec. 112); and Mr. Cowan so admits. (Rec. 93, 94.) Mr. Stern had no connection with the case beyond the preliminary stages.

Conclusion.

As it has been the very common practice in all the federal courts (especially since *Re Metropolitan Ry. Receivership*, 208 U. S. 90, 110), to have "consent" equity receiverships, where it is arranged in advance for a simple contract creditor to fill a bill, and for the defendant simultaneously to file its answer consenting to the receivership, your petitioner, of course, knew that the receivership was to be a "consent" one. The only fact distinguishing the case at bar from the ordinary "consent" equity federal receivership, is the means employed by the company's counsel to secure the delay in the State Court. But your petitioner *did not know* either when the bill was filed, or when the federal receiver was appointed, *any of the facts constituting what this court has found to be a fraud.* (Rec. 112.)

Your petitioner only learned of the fraud on the State Court, and of the facts constituting it, *at the same time* that the District Court learned those facts, to wit: March 13, 1925 (Rec. 16); and as neither the District Court nor the Circuit Court of Appeals thought that this fraud on the State Court invalidated the federal receivership, it did not occur to your petitioner that he should, on account of this prior fraud, for which he was in no wise responsible, withdraw from the case.

If your petitioner should have withdrawn from the case upon learning of the fraud that had previously been

perpetrated, his failure so to withdraw was only an error of judgment, which it is his belief is pardonable in view of the attitude of the District Court and of the Circuit Court of Appeals.

Wherefore your petitioner, Edward R. Johnston, prays that the opinion may be modified as hereinbefore indicated, and that this Court will take such further action as it deems appropriate.

EDWARD R. JOHNSTON,
Pro se

March 12, 1928.

perpetrated, his failure so to withdraw was only an error of judgment, which it is his belief is pardonable in view of the attitude of the District Court and of the Circuit Court of Appeals.

Wherefore your petitioner, Edward R. Johnston, prays that the opinion may be modified as hereinbefore indicated, and that this Court will take such further action as it deems appropriate.

EDWARD R. JOHNSTON,
Pro se

March 12, 1938.

Personally, I am always blind, and am convinced that neither Mr. Johnston or Mr. Stern had actual knowledge of Comm's fraudulent conduct when the bill of complaint was filed in the Federal court.

- Lloyd C. Whitman

BENJAMIN F. GOLDSTEIN
ATTORNEY & COUNSELOR
OTIS BUILDING
CHICAGO
TELEPHONE DEARBORN 6244

March 9, 1928

Edward R. Johnston, Esq.,
11 South La Salle Street,
Chicago, Illinois.

Dear Sir:

As solicitors for Harry Hurwitz and Max Goldenberg, complainants in the bill filed in the Circuit Court of Cook County against Daniel Boone Woolen Mills, Inc., Cause No. 435641, we have examined the petition which you propose to file in the Supreme Court of the United States in the case of Harkin et al., vs. Brundage, et al, No.117, for a modification of certain passages appearing in the opinion rendered by said court in said cause, on the 20th day of February, A. D. 1928, and we beg to state that we agree with you that the changes requested in the opinion should be made, as such changes agree with the record and with the facts as we understand them.

Very truly,

Benjamin F. Goldstein